Supreme Court, U.S.
FILED

No. 09-1494 JUN 4 - 2010

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In The

Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE
and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners transformed a wrecked Oldsmobile 88 into an expressive work of art and displayed it on private property. The City of San Marcos, Texas, cited and later seized the artwork, claiming it violated the City's "junked vehicle" ordinance because it was visible from the street.

The Fifth Circuit has reasoned that the First Amendment protects only "great works of art." It held that the City may completely ban any public display of artwork made using junked vehicles.

The Fifth Circuit's First Amendment analysis conflicts with *Hurley v. Irish-American GLB Group of Boston*, 512 U.S. 557 (1995), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and with decisions of the Second and Ninth Circuits applying *Hurley* and *Ward*. The questions presented for review are:

1. Does the First Amendment protect only "great works of art"?

2. May a city wholly ban the public display of an entire category of art, leaving enclosed, private display as the only available option?

PARTIES TO THE PROCEEDING

The Petitioners are Michael Kleinman, Scott Wade and John Travis, the plaintiffs and appellants below. The Respondent is the City of San Marcos, Texas, the defendant and appellee below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 597 F.3d 323 (5th Cir. 2010). App. 1. The final judgment and findings of fact and conclusions of law of the United States District Court for the Western District of Texas are not reported. App. 19.

JURISDICTION

The Fifth Circuit entered its judgment February 10, 2010. Petitioners' Petition for Rehearing was denied March 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The First Amendment is applicable to the states and political subdivisions through the Fourteenth Amendment.

The City of San Marcos Code provides, in relevant part:

> Sec. 34.191. Definitions.
>
> *Junked vehicle* means a vehicle that is self-propelled, inoperable and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;
>
> (2) Is wrecked, dismantled, partially dismantled or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.
>
> *Nuisance vehicle* is a vehicle that is a public nuisance under 34.194.
>
> Sec. 34.194. Junked vehicles declared a public nuisance.
>
> A junked vehicle that is located in a place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance creating a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing

development of the City and is a public nuisance.

Sec. 34.196. Nuisance vehicles prohibited on private property.

(a) It is unlawful for a person that owns or controls any real property to maintain, allow, cause or permit a nuisance vehicle to be placed or to remain on the property.

Sec. 34.197. Defenses to prosecution.

(1) The vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property;

. . .

(4) The vehicle is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view and it is the only one on the property;

STATEMENT OF THE CASE

1. *The Facts.* Petitioner Michael Kleinman held a "car bash" charity event where participants paid to smash a donated Oldsmobile 88. App. 1, 59. He then had the doors welded shut, the glass, hood and trunk lid removed, the top cut off and the resulting object filled with dirt and planted with native Texas cacti. *Id.* App. 60.

Kleinman then commissioned two local visual artists, Petitioners Scott Wade and John "Furly" Travis, to transform the smashed vehicle into a work of art. App. 60. Each artist painted one side. App. 61. Wade painted stylized local San Marcos scenes. App. 65-67. Travis painted abstract, colorful objects and animals. *Id.*

The City stipulated that (1) from the beginning, Kleinman had intended to turn the smashed vehicle into artwork; (2) Wade intended to convey the idea of transforming "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it;" (3) Travis intended to convey the idea that "you could take a junked vehicle, junk canvas, and create something beautiful out of it;" (4) using a smashed vehicle was integral to both artists' expression; and (5) the resulting creation "is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life." App. 60-62.

Petitioners displayed the artwork on Kleinman's private property, in a location visible from Interstate Highway 35, the main highway running from San Antonio to Austin and Dallas-Fort Worth, and from other roads and easements. App. 60. While the artwork was located on the same property as Kleinman's Planet K store, it contains no advertisement, only the artists' painting and the words "Make Love Not War." App. 65-66.

2. *Proceedings below.* The City of San Marcos issued a notice that the artwork was a "junked vehicle" that violated the San Marcos City Code. App. 63. A San Marcos municipal judge agreed and ordered it removed or brought into compliance with the code. App. 63.

The city code defines any inoperable vehicle that is "wrecked, dismantled or discarded" to be a "junked vehicle." San Marcos Code § 34.191. The code declares a "junked vehicle that is located in a place where it is visible from a public place or public right-of-way" to be a public nuisance, and prohibits landowners from permitting "nuisance vehicles" to remain on their property. San Marcos Code §§ 34.194, 34.196.

The code permits only two exceptions, each requiring that the vehicle not be publicly visible.[2] The ordinance contains no exception for junked vehicles used in art. There is no dispute that the ordinance effectively prohibits the public display of Petitioners' artwork anywhere in the City.

Petitioner Kleinman, later joined by Petitioners Wade and Travis, sued to enjoin the City from applying the code to their artwork. The City removed

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[2] The "vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property," or "is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view. . . ." San Marcos Code § 34.197(1), (4).

the case to the United States District Court for the Western District of Texas (Austin Division).

The Hon. Sam Sparks initially granted the City's motion to dismiss, then reversed that ruling on motion for rehearing, holding that "if Kleinman can establish the car planter itself is his message . . . [he] will have established that the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no 'alternative channel of communication' for his unique message." App. 47.

After a bench trial, the District Court reversed itself again. This time it held that the sole option of a fully-enclosed private display, not visible anywhere from the street, road, right of way or adjacent property, provided "adequate alternative avenues of communication through the medium of the junked car." App. 33.

The Fifth Circuit affirmed in an opinion by Chief Judge Edith H. Jones, joined by Circuit Judge Prado, with Circuit Judge Haynes concurring in the judgment only. App. 1.

The Fifth Circuit first questioned whether, despite the uncontested testimony and stipulations by the City, the Petitioners' artwork "could be considered a constitutionally-protected expression" at all. App. 6. Quoting this Court's opinion in *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 569 (1995), the Fifth Circuit held that *Hurley* "refers solely to great works of art," and that "[n]either in

Hurley nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." App. 7.

"In an abundance of caution," the Fifth Circuit engaged in an alternative First Amendment analysis, coming to the same conclusion – that the City could ban any public display of Petitioners' artwork. App. 10-14. In a single paragraph, the Fifth Circuit concluded that the city-wide ban still left ample alternative channels of communication because the artwork could be displayed "behind a fence, indoors, or in a garage enclosure," and because Kleinman could "erect a sign" or "display a poster" of the artwork or "invite the public to view" it privately. App. 13.

Following the Fifth Circuit's denial of rehearing, the City seized and removed (but did not destroy) the artwork. Petitioners still want to publicly display their creation within the San Marcos city limits.

REASONS FOR GRANTING THE WRIT

The First Amendment applies to art. The First Amendment's protection of artistic expression is not limited to "great works of art" by famous artists. A city may not simply ban the publicly visible display, especially on private property, of an entire category of art.

The Fifth Circuit's analysis contradicts *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 569 (1995), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The Fifth Circuit's opinion is also in clear conflict with decisions of the Second Circuit and the Ninth Circuit, *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), and *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc).

The Fifth Circuit's opinion invites the very evil it condemns, making judges decide subjectively what art is "great" enough to protect.

The Fifth Circuit's opinion allows cities to enact bans on public display of artwork.

The Fifth Circuit's opinion should be reviewed to determine whether its reading of the First Amendment as applied to artistic expression, or the Second and Ninth Circuit's reading, is more consistent with this Court's precedent and the fundamental goal of protecting free expression from excessive government regulation.

I. THE FIFTH CIRCUIT'S ANALYSIS CONTRADICTS THIS COURT'S FIRST AMENDMENT HOLDINGS.

The Fifth Circuit's decision and analysis contradict two of this Court's key First Amendment decisions, *Hurley* and *Ward*. First, the decision below misreads *Hurley v. Irish-American GLB Group of*

Boston, 515 U.S. 557, 569 (1995), as holding that only "great works of art" merit constitutional protection, while lesser known works do not necessarily merit what the Fifth Circuit calls the "heavy machinery of the First Amendment." Second, the decision below misapplies *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), in holding that a city-wide ban on any public display of the Petitioners' artwork – even from private property – still leaves open the constitutionally-required "ample alternative channels of communication" because a private, enclosed display is not also banned.

A. The First Amendment Protects Art, Not Just "Great" Art.

Despite the City's stipulations that Kleinman "had always intended to turn the donated vehicle into an artwork," that the artists' paintings are "unique, one-of-a-kind images," that the work "contains and projects some level of artistic expression," and that use of a smashed car was "integral to [each artist's] expression," App. 60-61, the Fifth Circuit concluded that the First Amendment did not apply, "irrespective of the intentions of its creators," because it declared that Petitioners' artwork to be "a utilitarian device, an advertisement, and ultimately a 'junked vehicle.'" App. 9.

This logic defied the facts and binding stipulations of the parties, and put the cart before the horse, as if the reach of a city's junked vehicle ordinance

could determine the constitutional protection available to artistic expression. The iconic "Cadillac Ranch" in Amarillo and John Chamberlain's famous automobile part sculptures fall within the "junked vehicle" ordinance's terms, but that does not answer whether they may be banned from public view consistent with the First Amendment.

In reaching its flawed conclusion, the Fifth Circuit cited a single case from this Court, *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557 (1995). *Hurley* held that the organizers of the Boston St. Patrick's Day parade had a First Amendment right to select parade participants, free from government interference. *Hurley* is but one of many cases from this Court recognizing that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. This Court in *Hurley* rejected the concept that the First Amendment is "confined to expressions conveying a 'particularized message,'" because if so limited, it

> would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 569.

Surely, this Court cited Pollock's abstract paintings, Schönberg's expressionist music, and Carroll's "nonsense" poetry to show the breadth of First Amendment protection, not its limits. But the Fifth Circuit drew the opposite conclusion – that because

Hurley "refers solely to great works of art," the Constitution must stop with great works. App. 7. *But no speech – artistic or otherwise – requires public acclaim before finding constitutional protection.*

Despite years of precedent, the Fifth Circuit somehow still found uncertainty:

> Neither in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks.

App. 7.

This is simply wrong or, at a bare minimum, overlooks several decades of First Amendment precedent from the Supreme Court. This Court has held that all sorts of non-verbal expression find full Constitutional protection.[3] In fact, this Court's holding in *Hurley* itself reveals the Fifth Circuit's error: *Hurley* unanimously found First Amendment protection in

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[3] *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (motion pictures); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (expression of serious literary, artistic, political, or scientific ideas, unless legally obscene); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975) (topless dancing); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (peaceful marches); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (black arm bands); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-ins); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943) (refusal to salute flag).

the act of choosing who may join a parade – expressive, yes, but hardly a "great work of art."

The Fifth Circuit's final comment on *Hurley* gives further reason for review. Hesitating to employ "the heavy machinery of the First Amendment . . . in every case involving visual non-speech expression," the court distinguished *Hurley* because its "reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression." App. 9. Petitioners do not ask for a "hierarchy" of art; indeed, courts judging what art is sufficiently "fine" or "great" to warrant constitutional protection would be anathema to our Bill of Rights. But the Fifth Circuit did exactly what it disdained – by distinguishing "great works of art" from Petitioners' work, and by dismissing the artists' intentions, the court applied its own "hierarchy," elevating "great" art over Petitioners'.

Art criticism aside, under the law, because Petitioners' work was artistic and expressive – *and was stipulated to be such by the City of San Marcos* – it merits the same legal protection as the works of Pollock, Schönberg and Carroll. This Court should grant review, because the Fifth Circuit wrongly concluded that *Hurley* held otherwise.

B. Banning Any Publicly Visible Display of Artwork on Private Property is Not Narrowly Tailored and Does Not Provide "Ample Alternative Channels of Communication."

"In an abundance of caution," the Fifth Circuit briefly addressed this Court's "intermediate scrutiny" First Amendment review applicable to content-neutral regulations of expression. App. 10-14. That standard permits enforcement of "reasonable restrictions on the time, place, or manner of protected speech," provided that

> the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

San Marcos' ban on public display of Petitioners' artwork is absolute: it cannot be displayed anywhere it can be seen from the sidewalk, street, right-of-way or adjacent property.

The ban applies despite the fact that Petitioners' artwork was rendered safe. The ban applies no matter how or where the artwork is displayed, even if that display addresses every "safety" concern imagined by the City. The ordinance bans display of

the artwork on a rooftop, behind a chain link fence, inside a Lucite box, or even inside a building if it is visible from a sidewalk through a window. The ordinance is unconcerned with the artwork's location – any public display is banned *anywhere* in San Marcos, even miles from Planet K, making the Fifth Circuit and District Court's reliance on a perceived connection between the artwork and the store legally irrelevant.

Because the City's ban on public display of artwork made using junked vehicles brooks no exception whatsoever, even when every "content-neutral" government rationale is satisfied, it effectively regulates Petitioners' expression based on their artistic choice of medium – an aesthetic decision.

This is a troubling and illegitimate basis for regulating artistic expression. As this Court noted in *Ward*, "[a]ny governmental attempt to serve purely aesthetic goals by imposing subjective standards . . . would raise serious First Amendment concerns." 491 U.S. at 793. The Fifth Circuit opinion denies this, claiming to "pretermit 'recourse to principles of aesthetics'" in its analysis. App. 10. But the Court's unilateral conclusion that "the 'expressive' component of [the artwork], considered objectively in light of its function and utility, is at best secondary," in fact reflects a wholly subjective and standardless rejection of the Petitioners' expressed artistic intent. The only "utility" in this work is its ability to support plant life, which is itself integral to the artists' message and choice of medium. App. 61.

But even if the cacti were removed, the same constitutional question would remain: Is San Marcos' city-wide ban on any public display of artwork made using junked vehicles narrowly tailored, and does it leave ample alternative channels of communication?

The Fifth Circuit, citing only *Ward*, answered "yes" – something neither this Court nor any Court of Appeals has ever done – because the artwork could be located "behind a fence, indoors, or in a garage enclosure," and because Petitioners could "erect a sign," "display a poster" or "invite the public to view" the artwork privately. App. 13.

Ward provides no support for this holding. *Ward* addressed New York City's regulation of the *volume* of sound amplification in a single public park bandshell, not a city-wide ban extending to private property as well as public parks which must accommodate various uses. *Ward*, 491 U.S. at 784. The restrictions in *Ward* were sufficiently narrow and left open "ample alternative channels of communication" because the amplification guideline did not "attempt to ban any particular manner or at a given place or time." *Id.* at 802. "Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification." *Id.* The music still could be played at the bandshell, just not quite so loudly.

Ward's acceptance of a city's power to regulate the volume of speech in a public park provides no

support for the proposition that a city may totally ban any display of a category of artwork visible to the public. A total ban, by definition, leaves no alternative channels of communication – contrary to this Court's teaching in *Ward*.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS.

A. The Second Circuit Held in *Bery v. City of New York* that the First Amendment Does Not Permit a City-Wide Ban on Public Displays of Art.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit reviewed the city's street vendor regulations which, due to excessive demand, had effectively banned any new artists from obtaining permits to display and sell their works on city sidewalks or parks. The court found the city's regulations unconstitutional – even though they regulated only display and sale *on* public property, not displays visible *from* public property, as here.

First, the court clearly does not adhere to the Fifth Circuit's suggestion that only "great works of art" merit First Amendment protection:

> Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is

> similarly entitled to full First Amendment protection.

Bery, 97 F.3d at 695.

Next, the Second Circuit held that the effective city-wide ban was too broad:

> The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, *but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice.*

Id. at 697 (emphasis added).

Finally, the Second Circuit rejected the argument, accepted by the Fifth Circuit here, that non-public, enclosed, museum-gallery displays provide "ample alternative channels of communication," holding that artists "are entitled to a *public* forum for their expressive activities." *Id.* at 698 (emphasis in original). Museum or gallery shows are simply not available to all artists, and

> [d]isplaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. *The public display and sale of artwork is a form of communication between artist and the public not possible in the*

> *enclosed, separated spaces of galleries and museum.*"

Id. (emphasis added).

Such was the case here – both the content (use of a wrecked vehicle) and the context (next to a highway filled with cars) were integral to Petitioners' expression. *See* App. 54. Forcing the artwork indoors (if space can be found, and afforded) divorces it from both its intended audience and its intended setting.

The Fifth Circuit overstated the Second Circuit's refinement of *Bery* in *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2nd Cir. 2006), which upheld New York City's vendor regulations as applied to a person wanting to sell painted t-shirts on city streets. Without denying that the t-shirts were expressive, and thus entitled to First Amendment protection, the Second Circuit found the denial of a permit to conduct the commercial activity of selling shirts permissible, both because indirect sale through licensed vendors was possible, and because ample public display alternatives to display the t-shirts remained:

> Notwithstanding New York's licensing permit, plaintiffs may personally distribute their art to the public free of charge, or should they wish to turn a profit, they may enlist licensed vendors to sell their clothing. At most, therefore, § 20-435 prohibits plaintiffs, as unlicensed vendors, from *personally* selling their wares *for a profit* and *at a venue of their choosing*.

Id. at 101 (emphasis in original). Essential to *Mastrovincenzo*'s holding, therefore, was the continued ability to publicly display (if not sell) the expressive works – an option wholly unavailable to Petitioners.

B. The Ninth Circuit Held in *Berger v. City of Seattle* that "Ample Alternative Channels of Communication" Means Leaving Some Public Venues Available.

In *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), the Ninth Circuit addressed in detail the intermediate scrutiny "ample alternative channels for communication" element. The Fifth Circuit's opinion here did not address *Berger*, but it conflicts with *all* the *Berger* opinions that addressed that issue – the majority as well as two dissents.

Berger reviewed Seattle's permitting regulations for street performers in the Seattle Center, a large city park. The district court held that the city's regulations limiting street performers to sixteen designated locations in the park violated the First Amendment. The Ninth Circuit reversed and remanded for further factual development, exploring in depth whether those sixteen locations provided constitutionally-adequate alternatives.

Judge Berzon's majority opinion, joined by six judges, cited *Ward* and held, like *Bery*, that "an alternative is not ample if the speaker *is not permitted to reach the intended audience.*" *Id.* at 1049 (quoting *Long Beach Area Peace Network v. City of Long*

Beach, 552 F.3d 1010, 1024 (9th Cir. 2008)) (emphasis added). Even though there were *sixteen* locations available in the park, the court remanded for trial because there was evidence that those locations were not ample – too far from sidewalks and because trucks, equipment, and construction sometimes blocked some locations. *Id.* at 1049-50.

Judge Gould, in dissent, concluded that the "alternative means of communication are ample and secure," because, rather than banning speech outright, the regulation "funnels performance speech into sixteen locations near the most popular Seattle Center attractions, where the performers will be readily visible. . . ." *Id.* at 1076 (Gould, J., dissenting). Unlike here, there was no evidence that the regulation precluded "the entire medium of street performance or den[ied] street performers a reasonable opportunity for communication." *Id.* at 1078. He noted that "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication *unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting*." *Id.* (emphasis added).

Judge N.R. Smith found the available locations ample because only an average of five to eight performers were present even at peak times, the locations were all within the park, adjacent to pedestrian walkways, near the most popular attractions, and because the speakers could "reasonably expect that

their performances will be visible and audible to their expected audiences, even if not as close as they might be." *Id.* at 1088 (N.R. Smith, J., dissenting in part).

Notably, each opinion in *Berger*, majority and dissents, looked only to alternative locations *within the public park* to determine adequacy. Not a single judge, even those ready to uphold the regulation, thought public venues other than the Seattle Center would suffice, let alone the zero public locations available to Petitioners.

Neither the parties here nor the Fifth Circuit cited a single case permitting a ban on the public display of an entire category of artistic expression.[4]

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[4] Easily distinguished from *Bery* and *Berger* is a thirty-one year old case, *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1979), which interestingly rejected a superficially similar claim: that the display of a vehicle wreck was a protected "symbolic protest against police abuse of authority." Unlike the Petitioners here, however, the owner in *Davis* simply declared that the unmodified, unadorned car wreck conveyed a message about his son's car accident. The owner in *Davis* did nothing to transform the wreck into a genuine expressive work of art; he simply assigned a subjective "message" to a piece of junk. While the Fifth Circuit described *Davis* as applying "intermediate scrutiny," App. at 10, in fact *Davis* preceded *Ward v. Rock Against Racism* by ten years and failed to address the narrow tailoring and "ample alternative channels of communication" elements of the intermediate scrutiny standard. 555 F.2d at 190. The Fifth Circuit's misplaced reliance on *Davis* underscores the need for this Court to grant review and clarify what does – or what does not satisfy this element.

Like *Bery* and *Berger,* numerous district courts have struck down overbroad regulations of the public display of art. None has upheld a ban on public display of non-obscene art on private property. *See, e.g., Ecko.Complex LLC v. Bloomberg*, 382 F. Supp.2d 627, 628 (S.D.N.Y. 2005) (mayor of New York may not choose which medium graffiti artists could use for a public art exhibition, despite fear that use of mock subway cars "presented too great a risk of inciting criminal behavior" and "encouraged vandalism"); *Celli v. City of St. Augustine*, 214 F. Supp.2d 1255, 1261-62 (M.D. Fla. 2000) (City of St. Augustine ordinance that completely prohibited sale of artwork "on any and all public property," failed intermediate scrutiny because its total ban was "not narrowly tailored to serve a significant government purpose, leaving open ample alternative channels of communication" – despite the City's argument that speakers remained free to communicate on private property); *Trebert v. City of New Orleans*, 2005 WL 273253 (E.D. La. Feb. 2, 2005) (City of New Orleans could not refuse to allow an artist to sell his artwork in Jackson Square by claiming that other public venues such as the Superdome were available). The Fifth Circuit neither addressed nor distinguished these cases.

CONCLUSION

The Fifth Circuit has done something unique in First Amendment jurisprudence – permitted a city-wide ban of the public display of art based on the medium chosen by the artists. This Court should grant review to clarify whether the First Amendment permits what the City of San Marcos, Texas, has done.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50960

MICHAEL KLEINMAN; SCOTT WADE; JOHN FURLY TRAVIS,

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas

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(Filed Feb. 10, 2010)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

EDITH H. JONES, Chief Judge:

This appeal concerns whether a junked-vehicle ordinance designed to eliminate eyesores and promote public order, SAN MARCOS, TEX., CODE OF ORDINANCES § 34.196(a), can be applied to a wrecked Oldsmobile 88 that has been put to use as a cactus planter, colorfully painted, and adorned with the words "make love not war." Appellants contend that

the car is an expressive artwork and that interference with this display violates their rights under the First Amendment and the Visual Artists Right Act (VARA). 17 U.S.C. § 166A(a)(3). The district court rejected both claims, then went further and ordered the owner to comply with a removal order of the San Marcos municipal court. We also reject Appellants' constitutional and statutory claims but vacate the district court's attempt to enforce the municipal court order.*

I. BACKGROUND

Appellant Michael Kleinman operates Planet K stores throughout the San Antonio and Austin areas. Planet K stores are funky establishments that sell novelty items and gifts. Kleinman has a tradition of celebrating new store openings with a "car bash," a charity event at which the public pays for the privilege of sledgehammering a car to "a smashed wreck." The wrecks are then filled with dirt, planted with vegetation, and painted. Placed outside each store, the "planters" serve as unique advertising devices.

An Oldsmobile 88 car-planter was created upon the opening of a new Planet K store in San Marcos, Texas. Kleinman arranged to have the smashed car planted with a variety of native cacti and painted with scenes of life in San Marcos. Positioned in front of the store, the distinctive planter is visible to

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* Judge Haynes concurs in the judgment only.

motorists traveling north on Interstate 35. Kleinman did not dictate the content of the illustrations, but he requested that the phrase "make love not war" be incorporated into the design. Two local artists, Scott Wade and John Furly Travis, were commissioned to paint the wreck. At trial, Travis testified that he had no particular message in mind when he painted the car, "just happiness." He intended his images to convey the idea that "you could take a junked vehicle, junk canvas, and create something beautiful out of it." Wade sought to transform "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it." Wade explained that his intent was to describe American car culture and the link between gasoline and the war in Iraq.

On several occasions during and after the conversion of the smashed wreck into a car-planter, the City of San Marcos ticketed Planet K and various Planet K employees under an ordinance banning junked vehicles. The ordinance declares junked vehicles to be a public nuisance and prohibits citizens from placing or keeping junked vehicles on their property. SAN MARCOS, TEX., CODE OF ORDINANCES §§ 34.194, 34.196(a). The ordinance defines a "junked vehicle" as follows:

> *Junked vehicle* means a vehicle that is self propelled, inoperable, and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;

> (2) Is wrecked, dismantled, partially dismantled, or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.

Id. § 34.191.

Kleinman contested the tickets and requested a hearing to determine whether the car-planter falls within that definition. The San Marcos municipal court found that it did and ordered the car-planter removed or brought into compliance by concealment behind a fence or in an enclosure.[1] Kleinman then brought suit for injunctive relief in state court. The City removed the case to federal district court. Wade and Travis joined the suit to assert their claims under VARA.

Following a bench trial, the district court determined that the application of the junked-car ordinance to the car-planter would not violate the First Amendment and that Wade and Travis failed to state a statutory claim for relief. The district court also ordered all three plaintiffs *sua sponte* to comply with the municipal court order and bring the car-planter

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[1] A junked vehicle can be brought into compliance if the "vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property" or if the "vehicle is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view and it is the only one on the property," SAN MARCOS, TEX., CODE OF ORDINANCES § 34.197(a)(1), (a)(4).

into compliance with the City Code within thirty days. This appeal ensued.

II. STANDARD OF REVIEW

This court reviews a district court's factual findings after a bench trial for clear error and its legal conclusions *de novo*. *Water Craft Mgmt. LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006). Clear error exists:

> if (1) the findings are without substantial evidence to support them, (2) the court misapprehended the effect of the evidence, and (3) although there is evidence, which if credible would be substantial, the force and effect of the testimony, considered as a whole, convinces the court that the findings are so against the preponderance of credible testimony that they do not reflect or represent the truth and right of the case.

Id. Reversal for clear error is warranted only if the court has a definite and firm conviction that a mistake has been committed. *Id.*

III. DISCUSSION

A. First Amendment

Appellants' principal contention is simple: "visual art" is fully protected by the First Amendment. Consequently, neither the city ordinance nor the state

statute standing behind the ordinance[2] may impose a "content-based regulation" prohibiting the car-planter's public display. In the alternative, Appellants, while acknowledging that the car-planter is a "junked vehicle," assert that the ordinance fails to satisfy intermediate scrutiny as applied to their creation.

That this cactus planter, a three-dimensional advertisement for a novelty shop, could be considered a constitutionally-protected expression speaks more to the law's vagueness than to the capability or intention of the artists. In fact, the City stipulated that "the vehicle/planter is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life."[3] But this category is not so unbounded. The Supreme Court, in the course of

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[2] Texas Transportation Code declares a junked vehicle visible from a public place to be a public nuisance and its maintenance to be a misdemeanor punishable by a fine not to exceed $200. TEX. TRANSP. CODE § 683.071, 072 073 (2007). In addition, municipalities may adopt procedures to remove junked vehicles. *Id.* § 683.074. Any municipal procedures cannot apply to a junked vehicle (1) that is completely enclosed in a building in a lawful manner and is not visible from the street or other public or private property; or (2) that is lawfully stored in connection with the business of a vehicle dealer or junkyard, or is an antique or special interest vehicle, provided that the vehicle is orderly maintained, not a health hazard, and screened from the public view. *Id.* § 683.077.

[3] The City, of course, rejects a characterization of the planter as protected by the First Amendment.

applying the First Amendment to an expressive act (a Saint Patrick's Day parade), stated unanimously:

> As some of these examples [of non-speech protected expression] show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995) (citation omitted). *Hurley* refers solely to great works of art. Neither in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks.

Seizing on *Hurley*'s statement, the Second Circuit declared, in a case concerning New York City's street vendor regulations, that artworks including paintings, photographs, prints, and sculptures are "always" communicative and therefore entitled to "full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). Despite this broad language, the *Bery* court held only that the ordinance's application to vendors of those works did not stand up to intermediate scrutiny. *Id.* Further, the court reasoned that, because the crafts of the jeweler, the potter, and the silversmith are only sometimes "expressive," the constitutional protection

afforded those categories of works must be determined on a case-by-case basis. *Id.*

Subsequently, the Second Circuit grappled with *Bery*'s implication when vendors of T-shirts and ballcaps decorated with "graffiti art" sought an exemption from the same New York City ordinance. *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006). The court narrowed *Bery*'s broad dictum: "To say that the First Amendment protects the sale or dissemination of all objects ranging from 'totem poles' to television sets does not take us far in trying to articulate or understand a jurisprudence of ordered liberty; indeed, it would entirely drain the First Amendment of meaning."[4] *Id.* at 92 (citation omitted).

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[4] *Bery* has been criticized or limited by other lower court opinions as well. *See, e.g. White v City of Sparks*, 341 F. Supp. 2d 1129, 1139 (D. Nev. 2004) (declining to follow the *Bery* holding because it would be out of step with

> the First Amendment's fundamental purpose – to protect *expression*."); *Mastrovincenzo v. City of New York*, 313 F Supp 2d 280, 294 n.11 (noting that the difficulty with *Bery* is that it is "at once too broad and too narrow in their scope of protection. Conceivably, not every item of painting, photograph, print or sculpture that may be offered for sale on City sidewalks by any vendor is necessarily so expressive as to categorically merit First Amendment protection, but at the same time some objects outside those four categories may also be sufficiently expressive.

State v. Chepilko, 965 A.2d 190, 202 (N.J. Super. Ct. App. Div. 2009) (agreeing with criticism of *Bery*'s holding that any business activity that involves the taking and sale of photographs automatically qualifies for First Amendment protection and

(Continued on following page)

The court recast *Bery*'s distinction between fine art and decorative arts in terms that enforcement officers and vendors in the "real world" can understand and apply "without recourse to principles of aesthetics." *Id.* at 95. *Mastrovincenzo* ultimately decided that the "expressive" elements of the clothing merited some First Amendment protection, but that the city ordinance was narrowly tailored and left ample alternative avenues of communication, thereby satisfying intermediate scrutiny.

We share the *Mastrovincenzo* court's skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression. Protected expression takes many forms, but *Hurley*'s reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression. By analyzing the artist-vendors' rights under intermediate scrutiny, the *Bery* court effectively conceded as much.

Fortunately, we need go no further than that in the instant case. Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a "junked vehicle." These qualities objectively dominate any expressive component of its exterior painting.[6]

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concluding that such business activity is entitled to First Amendment protection only if it serves predominantly expressive purposes).

[6] We need not reach the City's contention that, if viewed as some form of protected speech, the car-planter represents

(Continued on following page)

Appellants concede that the car falls within the definition of the San Marcos ordinance. Moreover, the Eighth Circuit, confronted before *Hurley* with a wrecked auto that was displayed streetside to remind the public how the owner's son had been killed, had no difficulty finding that the auto's removal under a junked-vehicle ordinance survived intermediate scrutiny. *Davis v. Norman,* 555 F.2d 189 (8th Cir. 1977). When the "expressive" component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation. We therefore pretermit "recourse to principles of aesthetics."

In an abundance of caution, however, because the City concedes that the car-planter has some protected expressive content, we apply the intermediate scrutiny test articulated by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673 (1968), which balances the individual's right to speak with the government's power to regulate. *O'Brien* rests on the principle that when "speech" and "non-speech" elements are united in a course of conduct, a valid governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *Id.* at 376, 88 S. Ct. at 1678-79. Under *O'Brien,* a regulation is constitutional if it

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commercial speech entitled to a lesser level of constitutional protection.

is within the constitutional power of the government; it furthers an important or substantial governmental interest; the government interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376, 88 S. Ct. at 1679. The junked-vehicle ordinance passes muster under the *O'Brien* test.

First, regulation of junked vehicles is within the City's traditional municipal police powers. Second, important governmental interests justify the ordinance, the purpose of which is to protect the community's health and safety from the problems created by abandoned vehicles left in public view. A junked vehicle is a public nuisance:

> A junked vehicle that is located in a place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance creating a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing development of the City and is a public nuisance.

SAN MARCOS, TEX., CODE OF ORDINANCES § 34.196(a). Junked vehicles are an attractive nuisance to children. Rodents, pests, and weeds thrive in and around

them. Testimony showed that the City pursued more than 1,300 junked vehicle cases in the two years prior to trial. These facts, found by the district court, fully support the City's interests in regulating junked vehicles. The ordinance also tends to reduce urban blight, vandalism, and the depressing effect of junked vehicles on property values. Appellants' insistence that the car-planter has been rendered safe is immaterial to the constitutionality of the ordinance. The City's right to regulate junked vehicles, not the individual status of each vehicle, is the concern of First Amendment inquiry. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430, 110 S. Ct. 768, 779 (1990).

Third, the junked-vehicle ordinance is not intended to regulate "speech" at all but is a content-neutral health and safety ordinance. Appellants argue that the City's enforcement of the ordinance is motivated by disagreement with the content of the car-planter's "message" and thus should be subject to the strict scrutiny reserved for content-based speech regulations. The district court made no finding of an impermissible motivation, nor is such a finding compelled by the record.

Fourth, the ordinance is reasonably tailored to achieve the City's legitimate interests with only incidental restriction on protected expression. The ordinance authorizes junked vehicles to remain on private property if enclosed from public view. SAN MARCOS, TEX., CODE OF ORDINANCES § 34.197(a)(1). Appellants contend that the ordinance is not

narrowly tailored because it permits an exception for dealerships and junkyards. The underlying state statute, however, prohibits the City from adopting any procedures as to vehicles "stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard." TEX. TRANSP. CODE § 683.077. Thus, the City has an overarching legal basis for exempting dealerships and junkyards from its junked vehicle statute. Indeed, the exemption for businesses that deal with junked vehicles reinforces rather than discredits the content-neutrality of the junked vehicle ordinance. Both the City and the State sensibly distinguish individual conduct from commercial conduct, which creates different hazards and requires different regulations. In addition, the ordinance is limited to regulating the medium and location of the car-planter, and in so doing it reduces the blight and attractive nuisance problems caused by vehicular wrecks.

Appellants also argue that the enclosure requirement leaves them without any adequate alternative means of expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S. Ct. 2746, 2753 (1989). But as the district court noted, enclosing the car-planter does not cut off public access because it leaves Planet K free to display the car-planter behind a fence, indoors, or in a garage enclosure. Kleinman could still advertise and invite the public to view the car-planter. He could, pursuant to local law, erect a sign or display a poster of the car-planter visible to the public. Because the ordinance affords ample

alternative means for Appellants to express their messages, this court will not second-guess the scope of the ordinance nor impose Appellants' preferred display mode on the City. *Id.* at 800, 109 S. Ct. at 2758.

B. VARA

Appellants Travis and Wade also raise claims under the VARA. The VARA provides the author of a work of visual art with the right:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3). The district court denied relief under VARA, finding that the junked-vehicle ordinance does not require the destruction of a junked vehicle, merely its screening from general public view.

The preliminary statutory issue, however, is whether the car-planter qualifies as a "work of visual art" under the VARA. The statute excludes "any merchandising item or advertising, promotional, descriptive, covering, packaging material or container" from protection. 17 U.S.C. § 101. The district court found

that the car-planters are closely associated with Planet K, are part of the store's corporate image and culture, and are a distinctive symbol of the Planet K business. These findings, which are not clearly erroneous, indicate that the car-planters are "promotional" material and thus outside of the VARA's protection. See *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003). For this reason as well as that of the district court, we affirm the conclusion that Appellants Travis and Wade failed to state a claim for relief under VARA.

C. Order for Compliance

The district court ordered that "Plaintiffs shall comply with the Order of the San Marcos Municipal Court" and "bring the car planter into compliance with City Code." Appellants assert this order was in error since the City never requested any affirmative relief. Further, Wade and Travis were not parties to the municipal court's order and cannot be ordered to "comply." We agree. Although the City contends that the order is actually in Kleinman's favor – by giving him thirty days to comply before any City enforcement action – the district court lacked jurisdiction to grant this relief. This portion of the district court's order must be vacated.

IV. CONCLUSION

For the reasons articulated above, we affirm the judgment on the merits but vacate the portion of the

district court's judgment that orders Appellants to comply with the municipal court order.

AFFIRMED IN PART AND VACATED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50960

D.C. Docket No. 1:08-CV-58

MICHAEL KLEINMAN; SCOTT WADE;
JOHN FURLY TRAVIS

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

JUDGMENT

(Filed Feb. 10, 2010)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part in accordance with the opinion of this Court,

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: 19 MAR 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No.
A-08-CA-058-SS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 25, 2008)

BE IT REMEMBERED on the 4th day of August 2008 the Court held a bench trial in the above-styled cause, and the parties appeared through counsel. The trial of this matter lasted one day and the Court heard testimony from the following witnesses: Michael Kleinman, Scott Wade, John Travis, Dr. Robert Bednar, and Kenneth Bell. The Court now enters the following findings of fact and conclusions of law.

Background

Plaintiff Michael Kleinman, in order to "make a philosophical statement about the need to find ways to combat the pollution caused by automobiles," held a charity event in which he allowed the general public to reduce a car to "a smashed wreck" with a

sledgehammer for $1 per swing. Amended Mot. File Am. Compl. Ex 2, Aff. Michael Kleinman. Kleinman then arranged to have the wrecked car modified into a planter holding a variety of native cacti and depicting scenes of life in San Marcos painted by local artists Scott Wade and John "Furly" Travis. *Id.* The car-planter was positioned in front of Planet K. At the bench trial, Kleinman testified Planet K is an establishment controlled by Kleinman but owned by a separate corporate entity.

On several occasions both during and after the conversion of the car into a planter, the City of San Marcos ticketed Planet K and various Planet K employees under the City's ordinances banning junked vehicles in public places. City of San Marcos Code of Ordinances §§ 34.191, 34.194, 34.196. The "junked vehicle" ordinances state, in relevant part:

> *Junked vehicle* means a vehicle that is self propelled, inoperable, and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;
>
> (2) Is wrecked; dismantled, partially dismantled, or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.

Id. at § 34.191.

> A junked vehicle that is located in a place where it is visible from a public place or

> public right-of-way is detrimental to the safety and welfare of the public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance constituting a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing development of the City and is a public nuisance.

Id. at § 34.194.

> It is unlawful for a person that owns or controls any real property to maintain, allow, cause, or permit a public nuisance vehicle to be placed or to remain on the property.

Id. at § 34.196(a).

It is a defense to prosecution under section 34.196 that:

> (1) The vehicle . . . is completely enclosed within a building and is not visible from the street or other private or public property. . . .

Id. at § 34.197.

Kleinman contested the tickets in a hearing before the San Marcos Municipal Court on January 10, 2008. The municipal court found the car-planter constituted a junked vehicle under the ordinances and ordered it removed or otherwise brought into compliance with the City Code.

Kleinman did not appeal the municipal court's order, but brought a separate civil suit in state court, asserting the City's ordinances, as applied to his car-planter, violated his right to free speech. The City removed, and this Court entered an order on March 7, 2008 finding the junked vehicle ordinances are a permissible "time, place, and manner" restriction on Kleinman's First Amendment rights, because the ordinances do not restrict Kleinman's right to publicly express his views – they limit only the manner in which he may do so by restricting the medium of the junked car. The Court dismissed his claims for relief.

On April 30, 2008, the Court granted Kleinman's Motion to Reconsider the Order of March 7, 2008. Kleinman argued the City ordinances restrict not just the manner in which he expresses himself, but the substance of his message, because the "medium of the junked car" is a substantive part of the message he wishes to convey. The Court stated "if Kleinman can establish the car planter itself is his message and is therefore entitled to whatever First Amendment protections attach to Kleinman's free expression of his ideas on automobile pollution, Kleinman will have established the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no 'alternative channel of communication' for his unique message." Order of April 30, 2008 at 8.

Finding "[t]he extent to which 'the medium is the message' in this case cannot be evaluated on the

pleadings alone," the Court withdrew its prior order and denied Defendants' motion to dismiss the case. The Court also granted Plaintiffs Wade and Travis, who painted the car planter, leave to join their claims for relief under the First Amendment and the Visual Artists' Rights Act (VARA) in an Amended Complaint, and granted a preliminary injunction against the removal or destruction of the car planter for the duration of the suit.

At the bench trial, the parties stipulated "the vehicle/planter is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant life." Joint Stipulations ¶ 16. The parties further stipulated Kleinman had "always intended to turn the donated vehicle into an artwork" and did not do so for the purpose of evading the tickets issued by the City before the car was fully painted and modified. *Id.* at ¶ 18.

On hearing Kleinman's testimony that he does not personally own Planet K or the land on which the car is located, the Court became concerned about his standing to sue. However, the parties have stipulated Kleinman owns the car planter itself. *Id.* at ¶ 15. Accordingly, the Court finds Kleinman has standing to assert that he has a right to display the planter as a work of art protected by the First Amendment. Wade and Travis have standing to bring First Amendment claims because they are the artists responsible for whatever level of protected expression the car planter conveys.

The Plaintiffs, Kleinman, Wade, and Travis, each testified about the public expression they intended the car planter to convey. Plaintiff Travis testified he had no particular or discrete message in mind when he painted the car – "just happiness." Plaintiffs Kleinman and Wade, however, both testified they intended the car planter to convey thoughts about the problems of American car culture, particularly the links between "gas guzzlers" and the current war in Iraq. Kleinman testified he requested that the car planter have the phrase "make love not war" incorporated into its design in protest of the "war where we're killing people over oil and gas rights."

At the bench trial, Kleinman testified the location of the car planter, which is visible to motorists passing on Interstate Highway 35, is an important part of the message.[1] He wishes to reach an audience that might not stop and come inside his shop or an art gallery to view the planter. Plaintiffs called Dr. Robert Bednar, the Chair of American Studies at Southwestern University, to testify that the car planter is "site specific" art and its location adjacent to the highway is an important part of its message about "car culture."

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[1] The Court notes the car planter is one of several unusual roadside embellishments in the neighborhood. For example, Kleinman's neighbor, a restaurant specializing in Mexican food, has an oversized sculpture of a handgun, pointing at the highway, that contains a functioning barbeque grill in its barrel.

The City, for its part, called City Marshall Kenneth Bell to testify about the history and purpose of the junked vehicle ordinances. Marshall Bell testified the City has had over 1300 open junked vehicle cases in the last two and a half years, including some cases where children were using the vehicles as forts, and at least one case where a child became locked inside an abandoned vehicle. Marshall Bell testified that in addition to being a nuisance attractive to children, junked vehicles in San Marcos may contribute to problems controlling rodents, pests, and weeds that tend to thrive in and around inoperable vehicles.

Analysis

I. First Amendment claims

As stated in this Court's Order granting Kleinman's Motion to Reconsider, the City's junked vehicle ordinances are "a content-neutral ban on nuisance vehicles visible from public places." Order of April 30, 2008 at 7. It is well established that a content-neutral regulation may restrict some constitutionally protected speech if the regulation "is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication." *World Wide St. Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. La. 2007 (citing *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999)).

This Court further found "[i]t is undisputed that the junked-car ordinances bar all public display of any junked vehicle – in other words, the ordinance does not leave open any 'alternative channel' of public communication through the medium of the junked car." Order of April 30, 2008 at 7. Plaintiffs argue the ordinance's ban therefore leaves them without an adequate alternative channel to communicate their message, because it is uniquely linked to the medium of the car.

Plaintiffs rely heavily on *Bery v. City of New York*, 97 F.3d 689, 696-97 (2d Cir. N.Y. 1996), to support this argument. The *Bery* Court granted a preliminary injunction prohibiting the enforcement of a New York City ordinance regulating street vendors, because "[t]he ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost." *Id.* Therefore, the *Bery* court reasoned, the ordinance failed to leave open adequate alternative channels of communication and was overbroad. *Id.*

Bery remains "at the forefront" of the case law delimiting the First Amendment's protection of visual art. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 93 and n.10 (2d Cir.N.Y.2006). Nevertheless, the courts interpreting *Bery* have found its broad interpretation of First Amendment protection for visual art in the context of content-neutral ordinances questionable. *See, e.g. White v. City of Sparks*, 341 F. Supp. 2d 1129, 1139-42 (D. Nev. 2004) (declining to hold that "all visual art is per se constitutionally

protected," and finding *Bery*'s "blanket presumption of protected status . . . out of step with . . . the First Amendment's fundamental purpose – to protect expression."); *Celli v. City of St. Augustine*, 214 F.Supp.2d 1255, 1258-59 (trial court expressly declined to reach as far as the *Bery* case's broad holding regarding visual arts as protected under the First Amendment).

Moreover, *Bery* has been expressly limited and qualified by the Second Circuit's 2006 opinion in *Mastrovincenzo v. City of New York*, 435 F.3d 78. The *Mastrovincenzo* court found the same licensing ordinance in *Bery* passed constitutional muster as applied to a vendor of "graffiti painted" clothing. *Id.* at 102. Though the *Mastrovincenzo* court found the graffiti art "contained sufficient expressive content to qualify for First Amendment protection," *id.*, the court further held the decorated clothing, "whose dominant purpose is not clearly expressive, present[s] line-drawing questions markedly distinct from the more-easily-classified 'paintings, photographs, prints and/or sculpture' at issue in *Bery*." *Id.* The court reasoned "the 'least restrictive means' [test] . . . in this context is likely to be more burdensome [for Plaintiffs] than it would be with respect to the traditional art forms at issue in *Bery*." *Id.*

In this case, Plaintiffs allege the car planter's "dominant purpose" is expressive. In support of this position, Plaintiffs offered the expert testimony of Dr. Bednar, who compared the car planter to "Cadillac Ranch," "Carhenge," and other "acts of car art"

throughout the country. The Court notes, however, that the car planter at issue in this case is markedly different from the car sculptures identified by Dr. Bednar. Specifically, the item in this case is not a sculpture, whose sole purpose is expressive and not functional. The item at issue here has both expressive and functional elements; it is not a "pure statement" of Plaintiffs' beliefs about car culture, but is also both a planter and a distinctive symbol of the Planet K business. Kleinman has been installing similar car planters at Planet K locations since 1990. The "art cars" are a part of Planet K's corporate culture and public image, as shown by the petition Kleinman introduced into evidence at the bench trial. Pl's Ex. 13. The petition to save the "Cactus Art Car" was signed by hundreds of individuals at the Planet K store and expressly links the car planter to Planet K's corporate history. "We, the undersigned, believe that the Cactus Art Car located in front of the Planet K at 910 N. IH35 is a welcome addition to our neighborhood! . . . Planet K Gifts started in Austin & San Antonio in 1990 and has proven over the years to be a good neighbor and corporate citizen at all of it's [sic] locations." Pl's Ex. 13.

Plaintiffs dispute that Planet K's multiple car planters are commercial speech, arguing they do not display a Planet K logo or otherwise advertise the Planet K stores. Indeed, the Court finds the car planters are not "commercial speech" in the same manner as a billboard or other advertisement. However, the record establishes the car planters are

closely associated with Planet K and are part of the store's corporate image and culture. Given this quasi-commercial application, along with the functional aspects of the "car art" as a planter, the "Cactus Car Art" at issue in this case certainly falls into the realm of applied art identified by *Mastrovincenzo* as "markedly distinct from the more-easily-classified 'paintings, photographs, prints and/or sculpture' at issue in *Bery*." 435 F.3d at 102.

This is not to say that the car planter is outside the scope of First Amendment protection, or that it is subject to less than intermediate scrutiny. Rather, as the *Mastrovincenzo* court noted, "whether a regulation is narrowly-tailored can only be determined by considering the scope of its application relative to the government objectives being pursued, taking context into account." *Id.* at 102 (citing *Menotti v. City of Seattle*, 409 F.3d 1113, 1140 & n. 52 (9th Cir. 2005) (endorsing a "pragmatic application of the ample alternatives test" that focuses on the particular context in which speech restrictions will apply . . . "*)*). In the instant case, a particularly important bit of context is the fact that the Plaintiffs' chosen artistic medium, the junked car, is *in itself* a problem a whole chapter of the San Marcos City Code is designed to regulate.

The City of San Marcos has articulated several legitimate government interests in prohibiting junked vehicles visible from public thoroughfares. In particular, the City asserts junked vehicles can be an attractive nuisance, inviting injury to children and others who may climb on them and hurt themselves.

Plaintiffs assert the car in this case has been "made safe" by draining its fluids, welding its doors, hood, and trunk shut, and filling it with dirt and cacti. Nevertheless, the City has a legitimate concern that this car planter, like other junked cars, remains an attractive nuisance – Kleinman himself testified he began planting cacti in all his car planters to discourage people from climbing into them and picking the plants he initially grew there.

The City ordinances do not require that the car planter be destroyed, merely enclosed from public view. City Code § 34.197(1). Plaintiffs assert this requirement is overbroad. However, it has long been established that a content-neutral ordinance "need not be the least restrictive or least intrusive means" of satisfying a legitimate government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Screening an attractive nuisance from public view effectively reduces the "attractive" qualities of the nuisance, and the City's interest in reducing the dangers of attractive nuisances would not be effectively served absent the screening requirement.

Plaintiffs argue the requirement that the car planter be enclosed leaves them without an adequate alternative means of expression. This Court, in its order on the Motion to Reconsider, agreed. *See* Order

of April 30, 2008 at 8. However, on further review of the evidentiary record, the Court finds an enclosed space, open to the public, on the Planet K lot is an adequate alternative channel of expression.

Enclosing the car planter does not cut off public access to the car planter. The *Mastrovincenzo* court found an ordinance preventing all public sale of plaintiffs' applied art was constitutionally permissible based on plaintiffs' access to alternative, enclosed venues such as galleries and stores. 435 F.3d at 102. Similarly, the City's ban on all public display of the car planter in this case leaves open ample opportunity to display the car planter to patrons of Planet K and any other individual who cares to come inside the screening structure to look at it.

The Court is mindful that "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). In this case, the requirement that the car be enclosed does not prevent Plaintiffs from advertising the existence of the car planter to passers-by and inviting the general public to come in and view the piece.

Of course, enclosing the car planter means the only people who will receive its message are those who accept this invitation. Plaintiffs will not be able to display the car planter to the drivers passing on

Interstate 35, whom Plaintiffs contend are a crucial part of their audience. The Court finds, however, that although these drivers may be part of the audience Plaintiffs wish to reach, the medium of the junked car cannot plausibly be considered an essential part of the expressive content Plaintiffs wish to convey to this group. Dr. Bedmar conceded on cross examination that a driver passing on Interstate 35 would likely be unaware of the car planter's nature as a "junked car," and would see only a brightly painted car with some plants growing in it. To the extent "the medium is the message" in this case, the only audience who receives the unique message of the junked car consists of those who are close enough to see the fact that the car planter is a destroyed automobile. These are people who have already elected to come onto the Planet K lot.

Plaintiffs argue their message is not only medium-specific, but site specific. Dr. Bedmar testified the car planter's proximity to both the highway and the Planet K store are important elements of its message. However, enclosure of the car planter will not necessarily alter either element. Moreover, "alternative channels of expression . . . need not 'be perfect substitutes for those channels denied to plaintiffs.'" *SEIU v. City of Houston*, 542 F. Supp. 2d 617, 627 (S.D. Tex. 2008) (quoting *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007)). "In the 'ample alternatives' context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a 'reasonable opportunity'

for communication." *Menotti v. City of Seattle*, 409 F.3d 1113, 1141-42 (9th Cir. Wash. 2005) (citing *Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986)). The First Amendment simply "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *SEIU*, 542 F. Supp. 2d at 634 (S.D. Tex. 2008) (quoting *Heffron*, 452 U.S. at 647).

The Court finds the City's ordinance requiring that junked vehicles be enclosed from public view, as applied to Plaintiffs in this case, is sufficiently narrowly tailored and leaves open adequate alternative avenues of communication through the medium of the junked car. Plaintiffs have stated no violation of their rights under the First Amendment.

II. Visual Artists' Rights Act

Plaintiffs Wade and Travis, the painters of the car planter, assert an additional statutory cause of action under the Visual Artists' Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 106A *et seq.* VARA gives the creator of certain works of visual art the right to prevent "intentional distortion, mutilation, or other modification of that work. . . ." 17 U.S.C. § 106A(a)(3)(a). However, the statute contains an exception stating "The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused

by gross negligence." *Id.* at (c)(2). Courts considering this exception have uniformly found "an artist has no right to the placement or public presentation of his sculpture under the exception in § 106A(c)(2)." *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 100 (D. Mass. 2003) (collecting cases); *see also Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, *10 (S.D.N.Y. 2003) (the point of VARA "is not . . . to preserve a work of visual art where it is, but rather to preserve the work as it is"); *aff'd on recons., Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 13201, 2003 WL 21767653, *3 (S.D.N.Y. 2003) ("Nowhere in VARA does the statute make any legal distinction between site-specific or free-standing works. . . .").

The ordinances at issue in this case do not require the destruction of a junked vehicle, merely its screening from general public view. San Marcos City Code § 34.197(1). Because the artists have no right under VARA to the "placement or public presentation" of the car planter, they have failed to state a claim for which relief can be granted under this statute. *Phillips*, 288 F. Supp. 2d at 100.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Plaintiffs' constitutional challenges to San Marcos City Code §§ 34.191 *et seq.* are DISMISSED with PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's' claims under the Visual Artists' Rights Act, 17 U.S.C. §§ 106A *et seq.*, are DISMISSED with PREJUDICE.

IT IS FINALLY ORDERED that, within thirty (30) days of the entry of this Order, Plaintiffs shall comply with the Order of the San Marcos Municipal Court issued on January 11, 2008 and bring the car planter into compliance with the City Code.

SIGNED this the 22nd day of April 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No. A-08-CA-058-SS

JUDGMENT

(Filed Aug. 25, 2008)

BE IT REMEMBERED on the 22nd day of August 2008, the Court entered its findings of fact and conclusions of law following a bench trial. Thereafter, the Court enters the following:

> IT IS ORDERED, ADJUDGED, and DECREED that the plaintiffs Michael Kleinman, Scott Wade, and John "Furly" Travis TAKE NOTHING in this cause against the defendant the City of San Marcos, and that all costs of suit are taxed against the plaintiff, for which let execution issue.
>
> IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiffs shall bring their car planter into compliance with the San Marcos City Code within **thirty (30) days** of the entry of this judgment.

SIGNED this the 22nd day of August 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No.
A-08-CA-058-SS

ORDER

(Filed Apr. 30, 2008)

BE IT REMEMBERED on the 14th day of April 2008 the Court held a hearing in the above-styled cause, and the parties appeared through counsel. Before the Court were Plaintiff's Motion and Corrected Motion for Reconsideration [#14, 15], Defendant's Motion for Leave to File Late Response thereto [#19], Plaintiff's Motion and Amended Motion for Leave to File First Amended Complaint [#16, 17], and Plaintiff's Motion for Preliminary Injunction [#21]. Having considered these documents, the responses and replies thereto, the arguments of counsel at the hearing, the applicable law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

Plaintiff Michael Kleinman, in order to "make a philosophical statement about the need to find ways to combat the pollution caused by automobiles," held a charity event in which he allowed the general public to reduce a car to "a smashed wreck" with a sledgehammer for $1 per swing. Amended Mot. File Am. Compl. Ex 2, Aff. Michael Kleinman. Kleinman then arranged to have the wrecked car modified into a planter holding a variety of native cacti and depicting scenes of life in San Marcos painted by local artists. *Id.* The car planter was positioned in front of Planet K, an establishment owned by Kleinman.

The City of San Marcos ticketed Planet K and various Planet K employees under the City's ordinances banning junked vehicles in public places. City of San Marcos Code of Ordinances §§ 34.191, 34.194. Kleinman contested the tickets in a hearing before the San Marcos Municipal Court on January 10, 2008. The municipal court found the car-planter constituted a junked vehicle under the ordinances and ordered it removed.

Kleinman, did not appeal the municipal court's order, but brought a separate civil suit in state court, asserting the City's ordinances, as applied to his car-planter, violated his right to free speech. The City removed, and this Court entered an order on March 7, 2008 finding the junked vehicle ordinances are a permissible "time, place, and manner" restriction on

Kleinman's First Amendment rights. The Court dismissed his claims for relief.

Analysis

I. Motion to Reconsider and Related Motions

Kleinman moves the Court to reconsider its March 7, 2008 Order granting the City's original Motion to Dismiss his complaint [#3]. Kleinman explains that he inadvertently failed to answer the City's Motion to Dismiss because he was acting pro se and was unaware of the time limit for filing a response. Now represented by counsel, he asks the Court to reconsider his First Amendment claims.

The City points out that Kleinman was represented by counsel in state court and had advance notice from the City that the case would be removed to federal court. The City asserts Kleinman's state attorney, though he never made an appearance in federal court and is not admitted to the federal bar, was responsible for apprising Kleinman of the deadline to file a response under this Court's local rules. Therefore, the City argues, Kleinman's ignorance of the deadline for a response is no excuse.

In a stunning display of deadpan effrontery, the City seeks leave to file this argument late. The City actually asserts its own attorney's failure to read the local rules regarding the deadline to file a response in this District should be excused! The City stops short

of trying to distinguish its attorney's ignorance regarding this deadline from the pro se plaintiff's.

In the interest of even-handed fairness, both motions are GRANTED.

The Court now turns again to the merits of the City's initial motion to dismiss Kleinman's constitutional claims. In the March 7, 2008 Order, the Court ruled (1) the municipal court's finding that the planter is a junked vehicle within the meaning of the City Code is a final judgment, which Kleinman chose not to appeal, and this finding is entitled to res judicata effect in the instant proceeding; (2) Kleinman may nevertheless challenge the constitutionality of the City's junked vehicle ordinances as applied to his planter; and (3) the City's ordinances are a content-neutral "time, place, and manner" restriction that does not impermissibly infringe Kleinman's First Amendment rights.

At the hearing on April 14, 2008, the Court asked the parties to address the issue of whether Kleinman could have appealed the municipal Court's finding that the planter is a junked vehicle within the meaning of the City ordinances. Kleinman has always maintained that a new lawsuit seeking injunctive relief was his only recourse, while the City argued at the hearing that Kleinman could and should have followed the procedures described by this Court's Order of March 7, 2008, citing Texas Government

Code § 30.00014, for appealing a municipal court decision.[1]

At the Court's invitation, both parties have submitted post-hearing briefing on the subject, and Kleinman has further submitted a transcript of the January 10, 2008 municipal court hearing. This transcript establishes Kleinman's attorney gave notice in open court of Kleinman's intent to appeal the decision, exactly as required by Texas Government Code § 30.00014(d), but the City's attorney, Andrew Quittner, interjected on the record, "Actually, Judge, I don't think this is an appealable decision." Pl.'s Brief, Ex. 2, p. 78, l. 9-12, 21-22. Quittner went on to suggest the court give Kleinman a certain number of days to "file a TRO in district court," *id.*, the judge responded "That's what I'm going to do," *id.*, and that is, of course, exactly what happened in the case.

In light of these facts, the City is estopped from asserting res judicata on any issue determined by the municipal court, because both Kleinman and the municipal court judge reasonably relied on the City attorney's representation that an appeal was not available and the proper course of action would be to file a new suit for injunctive relief in the state's district court. *See Joleewu, Ltd. v. Austin*, 916 F.2d 250,

[1] In its post-hearing briefing the City also referenced the appeal procedures outlined in the San Marcos Municipal Code Chapter 55, which tracks Texas Government Code Chapters 29 and 30.

254 (5th Cir. Tex. 1990) (City estopped from asserting *res judicata* because of prior inconsistent representation in quasi-judicial proceeding).[2]

Accordingly, the Court WITHDRAWS that portion of the March 7, 2008 Order according the municipal court's judgment res judicata effect. The practical effect of this decision is not great, however, as the municipal court decision was explicitly limited to whether Kleinman's planter is a junked vehicle within the meaning of the City's ordinances, and Kleinman now concedes that it is. Kleinman argues the planter is both a "junked vehicle" *and* a piece of art, and its dual nature raises First Amendment concerns that prohibit the application of the junked vehicle ordinance in this particular case.

The Court considered and rejected Kleinman's "as-applied" challenge to the junked vehicle ordinances in its Order of March 7, 2008, finding that to the extent Kleinman's planter qualifies as a protected expression, the City's ordinances are a reasonable "time, place, and manner" restriction on the means of expressing Kleinman's idea. Kleinman now argues this Order failed to give due consideration to the fact

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[2] The Court notes, however, that nothing in the language of the San Marcos Municipal Code or Texas Government Code appears to restrict the right to appeal a municipal court decision to criminal cases. Accordingly, but for the issue of estoppel in this Case, the Court stands by its March 7, 2008 ruling that the proper course of action would have been to appeal the municipal court ruling as provided in TEX. GOV.T CODE § 30.00014(d)

that his artistic expression took place on private, not public property. He asserts the junked car ordinance cannot be constitutionally applied to this work of art because time, place, and manner restrictions do not apply to artistic expression on private property.

Plaintiff cites no direct authority for this claim, but does point to *Spence v. Washington*, 418 U.S. 405 (1974) as support. The *Spence* case concerned a college student who hung an American flag decorated with peace signs from the window of his apartment as an anti-war statement. The *Spence* court found it important that the flag and the apartment window were private property, and stated the case was not one "that might be analyzed in terms of reasonable time, place, and manner restrictions on a public area." *Id.* at 409.

Spence notwithstanding, reasonable time place and manner restrictions are applied to speech on private property, such as roadside billboards or adult bookstores, all the time. *See, e.g. City of L.A. v. Alameda Books*, 535 U.S. 425, 434 (U.S. 2002). The key inquiry is not whether the challenged speech occurs on public or private property, but whether the challenged restriction attempts to ban the speech altogether or "merely require[s] that it be distanced from certain sensitive locations." *Id.* at 434 (citing *Renton v. Playtime Theatres, Inc.*, 415 U.S. 41, 46 (1986)). The City points out that the junked vehicle and public nuisance ordinances apply only to vehicles visible from a public place or public right-of-way; these rules are not a total ban on junked cars but

merely a requirement that such vehicles be kept out of public view.

Kleinman argues that the Court's March 7, 2008 ruling failed to take into account the unique artistic nature of the car planter. Specifically, Kleinman argues the restrictions on his junked-car planter are not content-neutral because the "junked vehicle" is not just the canvas for the message but a substantive element of the message he wishes to convey. He asserts the medium of the junked car is "inextricably tied to [his] message" about automobile pollution. Mot. Reconsider at 8. Plaintiff points to other examples of "car art" in Texas, including "Cadillac Ranch" in Amarillo and the sculptures of John Chamberlain in Marfa, Texas. *Id.* at 7. According to Kleinman, the City's interest in public safety does not outweigh his interest in expressing environmental sentiment through the medium of the junked car, because the car planter has been "rendered safe" by removing all fluids and welding shut the doors.

The City disputes the sincerity of Kleinman's argument, pointing out that the car was cited as a junked vehicle *before* it was turned into a planter. The City argues Kleinman is simply trying to avoid the citation by turning the car into "art" after the fact. Kleinman asserts the car was destroyed in a charity "car bash" for the express purpose of creating his environmental artistic statement, and the City cited it as a junked vehicle while the process of transforming the car into a planter was in progress. The merits of this factual dispute cannot be evaluated

without a full evidentiary record. At the motion to dismiss stage, the facts alleged in the complaint must be taken as true and read in the light most favorable to Kleinman. *See Fernandez-Montes v. Allied Photo Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

The Court nevertheless rejects Kleinman's argument that the ordinances are not content neutral as applied to him. "'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *World Wide St. Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. La. 2007 (quoting *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)). The ordinances together constitute nothing more than a content-neutral ban on nuisance vehicles visible from public places.

Even a content-neutral regulation, however, cannot impermissibly burden a citizen's rights under the First Amendment. A content-neutral regulation that restricts some constitutionally protected speech is permissible only if the regulation "is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication." *Id.* (citing *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999)). It is undisputed that the junked-car ordinances bar all public display of any junked vehicle – in other words, the ordinance does not leave open any "alternative channel" of public communication through the medium of the junked car. The Court previously found this was a permissible restriction

because it simply limited the manner in which Kleinman could convey his message, not the message itself. Kleinman had an "alternative channel of communication" because the challenged ordinances would have allowed him to express his message to the public in any way that did not involve a junked car. However, if Kleinman can establish the car planter itself is his message and is therefore entitled to whatever First Amendment protections attach to Kleinman's free expression of his ideas an automobile pollution, Kleinman will have established the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no "alternative channel of communication" for his unique message.

The City argues that even if the junked vehicle is also a piece of art, creating a "car art" exception to the junked vehicle ordinance will transform what is now a content-neutral public nuisance regulation into an unworkable state evaluation of the artistic merits of every junked car described as "yard art" by its owner. The question, however, "is not whether plaintiff's work is art, but whether it is 'speech' within the protection of the First Amendment." *Trebert v. City of New Orleans*, No 04-1349 Sect "I" (2), 2005 U.S. Dist. LEXIS 1560, * 13 (E.D. La. Feb. 1, 2005). Courts have long "rejected the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2681 (2007) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255

(2002)). The City's argument that every owner of a junked car will respond to this case by breaking out the spray paint and creating a lawn ornament is likewise unpersuasive. The Courts "have never accepted mere conjecture as adequate to carry a First Amendment burden." *Trebert*, 2005 U.S. Dist. LEXIS 1560 at * 19 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)).[3]

The extent to which "the medium is the message" in this case cannot be evaluated on the pleadings alone. Accordingly, on revisiting the City's Motion to Dismiss in light of Kleinman's Motion to Reconsider, the Court WITHDRAWS its Order of March 7, 2008, and DENIES the Motion to Dismiss [#3] without prejudice to reurging after development of the evidentiary record in the case.

III. Motion to Amend

Kleinman seeks leave to file an Amended Complaint, adding the painters of the car planter, Scott Wade and John "Furly" Travis, as Plaintiffs. In the Amended Complaint, Kleinman, Wade, and Travis assert First Amendment claims similar to those discussed above, and Wade and Travis assert an

[3] The Court notes, once again, that the proper forum for initially determining the merits of future "car art" First Amendment claims is the municipal court, followed (if necessary) by the appellate review procedures described in Tex. Gov. Code § 30.00014.

additional statutory cause of action under the Visual Artists' Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 106A *et seq*. The City opposes the Motion to Amend on grounds of futility, arguing the addition of Wade and Travis does not change the First Amendment analysis of the case and further arguing Wade and Travis have failed to state a claim for which relief can be granted under VARA.

As described above, the Court has reconsidered its dismissal of the First Amendment claim, and Wade and Travis have standing to assert similar First Amendment claims because they are the individuals who actually created the car planter for Kleinman. Amendment of the Complaint to add Wade and Travis' First Amendment claims is therefore appropriate.

The City argues amendment of the complaint to include VARA claims would be futile. VARA gives the creator of certain works of visual art the right to prevent "intentional distortion, mutilation, or other modification of that work. . . ." 17 U.S.C. § 106A(a)(3)(a). However, the statute contains an exception stating "The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." *Id.* at (c)(2). Courts considering this exception have uniformly found "an artist has no right to the placement or public presentation of his sculpture under the exception in § 106A(c)(2)."

Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 100 (D. Mass. 2003) (collecting cases); *see also Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, *10 (S.D.N.Y. 2003) (the point of VARA "is not . . . to preserve a work of visual art where it is, but rather to preserve the work as it is"); *aff'd on recons., Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 13201, 2003 WL 21767653, *3 (S.D.N.Y. 2003) ("Nowhere in VARA does the statute make any legal distinction between site-specific or free-standing works. . . .").

The City points out that the ordinances at issue in this case do not require the destruction of a junked vehicle, merely its screening from general public view. Because the artists have no right under VARA to the display of their car planter without any such screen, the City argues they have failed to state a claim for which relief can be granted under this statute and amendment would be futile. Of course, the ordinances at issue do allow the City to confiscate the car planter, which Plaintiffs argue is tantamount to destroying it, if the car planter is not screened from public view. More to the point, Kleinman, Wade, and Travis are suing to enjoin a municipal court order instructing the City to seize the planter. In these circumstances, the issue is not limited to the mere placement of the artwork; there is a legitimate risk that the City's enforcement of the junked vehicle ordinances will constitute an "intentional distortion [or] mutilation" of the car planter in violation of

VARA. The City's argument that Kleinman is the party responsible for any such violation is unavailing – it is the City, not Kleinman, who will be taking destructive action against the car planter.

The City argues the car planter is not entitled to protection under VARA because it is a work of "applied art" specifically excluded from the scope of the statute. VARA itself does not define "applied art" other than to note that applied art is not protected as a work of visual art under the statute. 17 U.S.C. § 101. In contrast, one-of-a-kind sculpture is a "work of visual art" within the meaning of VARA. *Id.* It is not clear on this record whether the car planter is "applied art" or a unique sculpture. Accordingly, the motion to amend to add VARA claims is not obviously futile. Because leave to amend should ordinarily be freely given, *see* Fed. R Civ. P. 15, and Defendants have not demonstrated futility, undue prejudice, or other good cause to deny the amendment, the Court GRANTS Plaintiff's Motion to Amend the Complaint.

IV. Motion for Preliminary Injunction

The Court has discretion to grant a preliminary injunction if the Plaintiff establishes (1) an imminent risk of irreparable injury; (2) a substantial likelihood of success on the merits; (3) the hardship to the nonmovant if the injunction were granted would not outweigh the harm to the movant if relief were denied; and (4) the public interest would be served (or at least not harmed) by granting injunctive relief. *See*

eBay Inc. v. Merc-Exchange, LLC, 126 S.Ct. 1837, 1840 (2006). In this case, Plaintiffs oppose a municipal court order authorizing the City to seize the car planter. The merits of Plaintiffs' constitutional and statutory challenges to this seizure depend on factual issues that are not yet developed in the record before the Court. However, the balance of harms tips in Plaintiffs' favor: the seizure of the artwork allegedly infringes Plaintiffs' constitutional right to free expression, traditionally counted an "irreparable" injury. *See, e.g. Laredo Rd. Co. v. Maverick County*, 389 F. Supp. 2d 729, 748 (W.D. Tex. 2005). On the other hand, the car planter has been "rendered safe" by the removal of fluids and the welding shut of its doors and latches, so that the City's interest in the abatement of public nuisances is minimally impacted by the continued presence of the car during this litigation. The public interest will not be harmed by a preliminary injunction in this case; on the contrary, the public interest in broad protection of First Amendment rights will be served by an injunction pending this Court's decision on the merits.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Plaintiff's Motion and Corrected Motion for Reconsideration [#14, 15], and Defendant's Motion for Leave to File Late Response thereto [#19] are GRANTED.

IT IS FURTHER ORDERED that this Court's ORDER of MARCH 7, 2008 granting Defendants' Motion to Dismiss, and the Court's final ORDER OF DISMISSAL entered March 7, 2008 are WITHDRAWN. On reconsideration, it is ORDERED that Defendants' Motion to Dismiss [#3] is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion and Amended Motion for Leave to File First Amended Complaint [#16, 17] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction [#21] is GRANTED. Defendants are hereby enjoined from taking any action to remove the car planter at issue in this case until this Court enters a final decision on the merits.

IT IS FINALLY ORDERED that the above-styled case is **set for trial on May 27, 2008**, at 9:00 a.m. in Courtroom No. 2, United States Courthouse, 200 West Eighth Street, Austin, Texas.

SIGNED this the 30th day of April 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN,
SCOTT WADE, and
JOHN "FURLY" TRAVIS

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No.
A-08-CA-058-SS

ORDER

(Filed Jul. 31, 2008)

BE IT REMEMBERED on the 31st day of July 2008 the Court reviewed the file in the above-styled cause, specifically the City's Motion to Exclude the testimony of Doctor Robert Bednar [#41] and Plaintiffs' Response thereto. Having reviewed these documents, the applicable law, and the case file as a whole, the Court finds Dr. Bednar's proposed testimony appears relevant to the central question in the case: whether the junked car is inextricably entwined with Kleinman's public speech and thus part of the content, rather than the time, place, or manner, of his expression. The record establishes Dr. Bednar has an extensive history of scholarly, peer-reviewed publications regarding the communicative impact of site-specific and medium-specific forms of communication.

Defendant points out this cultural analysis is not readily susceptible to review under the *Daubert* factors. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). However, the Supreme Court has repeatedly clarified that the "factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue . . . " *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The *Daubert* factors are not exhaustive, and the Court's task is not to apply *Daubert* as "a definitive checklist or test," but to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." *Id.* at 152.

Defendant does not dispute Dr. Bednar's qualifications as an expert in his field. The Court finds the *Daubert* factors relied on by Defendant are largely inapplicable to the non-scientific expert testimony in this case.

Accordingly,

IT IS ORDERED that the Motion to Exclude [#41] is DENIED without prejudice to re-urging on grounds applicable at trial.

SIGNED this the 31st day of July 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50960

MICHAEL KLEINMAN; SCOTT WADE;
JOHN FURLY TRAVIS

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 8, 2010)

(Opinion February 10, 2010, 5 Cir., ___, ___, F.3d ___)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN; SCOTT WADE and JOHN "FURLY" TRAVIS, Plaintiffs	§ § § § §	CIVIL ACTION NO. A 08 CA 058 SS
v.	§	
CITY OF SAN MARCOS, Defendants.	§ § §	

PROPOSED STIPULATED FACTS

(Filed Aug. 1, 2008)

Plaintiffs Michael Kleinman, Scott Wade, and John "Furly" Travis and Defendant City of San Marcos stipulate to the following facts and exhibits for purposes of this case:

1. The City of San Marcos is a home-rule municipality in the State of Texas.

2. Plaintiff Michael Kleinman is a resident of Travis County, Texas. He owns multiple Planet K businesses in Texas.

3. Planet K is a novelty shop which sells, among other things, T-shirts, posters, and specific types of memorabilia.

4. In November of 2007, Plaintiff Kleinman opened a new Planet K business in San Marcos, Texas

located at 910 North IH-35, San Marcos, Texas. This area is zoned as a Community Commercial District by the City of San Marcos. Attached hereto as Exhibit A is a true and correct copy of the section of the City of San Marcos Zoning Map depicting Planet K's location.

5. The store manager for Planet K – San Marcos is Joe Ptak. Another employee is Terri Haggerton.

6. During the grand openings of some Planet K stores, Plaintiff Kleinman held events allowing people to smash an old vehicle to raise money for charity. The destroyed vehicles would then be painted and turned into a planter.

7. On November 1, 2007, Plaintiff Kleinman held an event whereby he charged $1 per swing to allow participants to smash a donated vehicle (an Oldsmobile 88) at the grand opening of Planet K – San Marcos. An automobile was donated as part of a fundraiser for a local charitable organization.

8. The vehicle was donated, but there was no transfer of the certificate of title to Michael Kleinman or his business.

9. The vehicle in question was driven to the Planet K – San Marcos site a few days before the event. The vehicle was then smashed during this charitable event.

10. After the vehicle was smashed, the vehicle was moved to the north side of the property.

11. The vehicle's location makes it visible from IH-35 and other public roads and easements.

12. On November 7, 2008, Terri Haggerton of Planet K – San Marcos was issued a Notice to Comply with the City's Junk Vehicle Ordinance and a notice of a right to a hearing to challenge the determination the vehicle was a junk vehicle under Chapter 34, Division 3 of the Code of Ordinance of the City of San Marcos.

13. The doors on the car were welded shut. The vehicle's glass was removed, the top was cut off and the hood and trunk lids removed. The ties and all loose items were removed. The doors and other removable parts were welded together. The vehicle was filled with a load of dirt, making it suitable for growing plants. Prickly Pear and Spanish Dagger cacti were planted in the dirt.

14. The vehicle/planter is no longer operational and cannot be driven. The vehicle/planter does not currently have either a State inspection sticker or license plate affixed to it.

15. Plaintiff Kleinman is the owner of the vehicle/planter, depicted in the photographs attached as Exhibit B and Exhibit C. The work is located entirely on private property under Plaintiff Kleinman's control.

16. Defendant City of San Marcos acknowledges that the vehicle/planter is an object which contains and projects some level of artistic expression after it

was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life.

17. Plaintiffs Wade and Travis are visual artists and joint authors of the work. Plaintiff Wade painted the portion of the work depicted in Exhibit B while Plaintiff Travis painted the portion of the work depicted in Exhibit C. Both artists retain the copyright in their respective contributions.

18. Plaintiff Kleinman had always intended to turn the donated vehicle into an artwork planter suitable for growing plants. He had previously done this at other Planet K locations in Texas.

19. Plaintiffs Wade and Travis were asked to paint on each side of the vehicle/planter. Each artist painted unique, one-of-a kind images on the vehicle chassis. Each artist used his own tools, controlled the time and manner of which he painted, and had discretion over what to paint. Neither artist was paid for his work.

20. Plaintiff Wade intended his artwork to convey, among other possible expressions, the idea of transforming "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it." In Plaintiff Wade's mind, the fact that his canvas is a "vehicle that used to be a polluter" is integral to his expression.

21. Plaintiff Travis intended his artwork to convey, among other possible expressions, the idea that "you

could take a junked vehicle, junk canvas, and create something beautiful out of it, something pleasing to see." In Plaintiff Travis' mind the fact that his canvas was a "junked vehicle" is integral to his expression.

22. The location of the vehicle/planter has not changed after it was painted and converted and is still visible from public streets and roadways after the painting.

23. There is no fencings, screenings, or obstructions to prevent view of the vehicle/planter from the public roadways.

24. The vehicle/planter is not isolated or restricted off by any rope or barriers.

25. The Code of Ordinances of the City of San Marcos is codified and the Court may take judicial notice of the Code's provisions.

26. The City of San Marcos Code of Ordinances §§ 34.191-201 are attached hereto as Exhibit D.

27. The City of San Marcos Code of Ordinances, Subpart B, Chapter 8, Article 1 is attached hereto as Exhibit E.

28. The City of San Marcos Code of Ordinances, Subpart B, Chapter 1, Article 9, Division 5 is attached hereto as Exhibit F.

29. The City of San Marcos Code of Ordinances Subpart B, Chapter 6, section 6.3.3.3 is attached hereto as Exhibit G.

30. After his employee received a notification of a junked vehicle, Plaintiff Kleinman requested a public hearing pursuant to Section 34.199 of the City Code of Ordinances, which was held on January 10, 2008. At the hearing, the Municipal Court judge determined that the work was a junked vehicle pursuant to Chapter 34, Division 3 of the Code of Ordinances of the City of San Marcos, and ordered its removal or that it otherwise be brought into compliance with City Code. A copy of the transcript of the hearing and the resulting judgment are respectively attached as Exhibits "H" and "I."

31. At the hearing, Plaintiff Kleinman's attorney gave notice in open court of Kleinman's intent to appeal the decision. The municipal court judge provided Plaintiff Kleinman a certain number of days to "file a TRO in district court." Plaintiff Kleinman filed suit in State District Court in Hay County, and did not appeal to the Hay County Court.

32. Plaintiff Kleinman incurred attorney's fees and costs totaling $8,851.29 in responding to the City of San Marcos' citation and the Municipal Court hearing.

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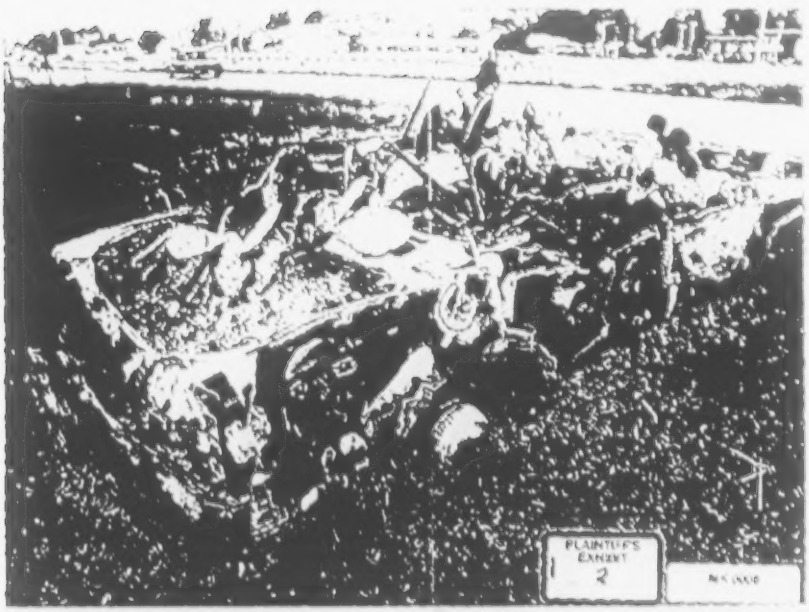

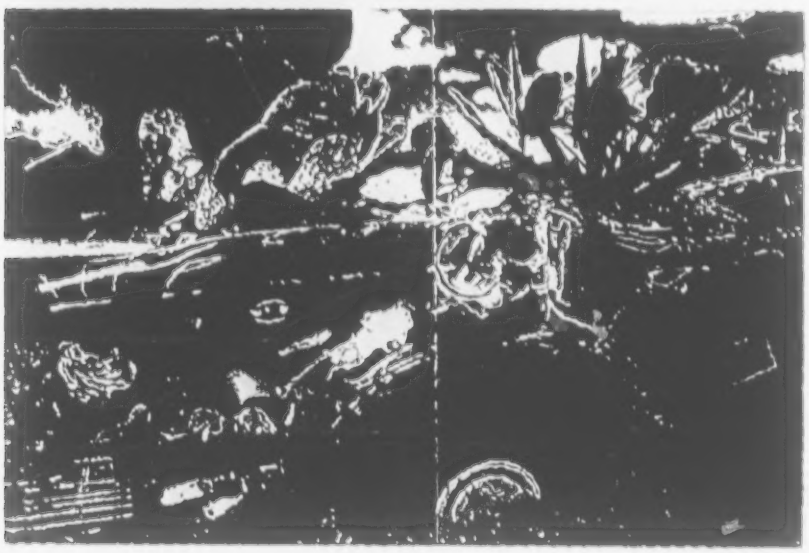

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No. 09-1494

Supreme Court, U.S.
FILED
AUG 5 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL KLEINMAN,
SCOTT WADE and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

The only true question presented is whether the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) apply to this junked vehicle. When a city passes a regulation, such as a junked vehicle ordinance, which is not designed to regulate speech, such regulation need only be reasonable and no greater than necessary to accomplish its objective in order to comply with the First Amendment. The Petitioners designed the questions presented to this Court as ones not before the Fifth Circuit in an attempt to make the case appealing for review.

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JURISDICTION AND STANDING

Petitioners Kleinman, Wade, and Travis all seek review of the Fifth Circuit's ruling but challenge only the holdings under the First Amendment, not the Visual Artists Rights Act ("VARA"). 17 U.S.C. § 106A(a)(3). By stipulation and findings of the trial court, Petitioner Kleinman is the owner of the junked vehicle at issue. Pet. Writ of Cert. App. 60 (Stip. 15). Petitioners Wade and Travis, as the artists commissioned by Kleinman, have no ownership or interest in the junked vehicle and therefore have no standing under the First Amendment. Wade and Travis only had standing under VARA, which they are not pursuing in this Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Fifth Circuit specifically held "Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a 'junked vehicle.' These qualities objectively dominate any expressive component of its exterior painting . . . When the 'expressive' component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation." *Kleinman v. City of San Marcos*, 597 F.3d 323, 327 (5th Cir. 2010).

In *United States v. O'Brien*, 391 U.S. 367 (1968) this Court held that when "speech" and "non-speech"

elements are united in a course of conduct, a valid governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *Id.* at 376, 88 S.Ct. at 1678-79. The object in question in this case is a junked vehicle. The Petitioners stipulated it was a junked vehicle under the definition of the ordinance. Pet. Writ of Cert. App. 60 (Stip. 14). It was a junked vehicle prior to any "artistic" alterations and it remains a junked vehicle with the same health and safety concerns. Whether the object has no painted images, graffiti painted on it, the Mona Lisa or "vote me for Mayor," such images are irrelevant to the enforcement of the City's health and safety concerns. The Petitioners were advised prior to any alterations that the City considered it a junked vehicle and needed to be removed; yet the Petitioners believed their car was exempt from *all* regulations in the name of the First Amendment.

The trial court made specific factual findings which the Fifth Circuit held were supported in the record. Planet K, Petitioner Kleinman's business, utilizes painted cars with cacti planted as part of its corporate image. The junked car in this case is a corporate icon. However, while it is also an advertisement, it still remains a junked vehicle. As a result, the First Amendment protection to such an object is not the same as the protection offered to religious or political speech. The trial court also determined the Petitioner had ample alternatives to display the object to the public, including fencing it off, enclosing it,

and placing it in a garage and inviting the public to view, or photographing it and displaying it on a billboard. Under the *O'Brien* test, the City's regulation, which mirrors the State of Texas junked vehicle regulation, is a reasonable, content-neutral regulation which does not violate Petitioners' First Amendment rights.

The Fifth Circuit's reference to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) was not a determination that only great works of art are entitled to First Amendment protection. All that the opinion states is that *Hurley* did not address the standard other than its generalized references to protecting great works of art. A straight forward reading of the Court of Appeals opinion makes it clear the opinion does not say what Petitioners claim. The Fifth Circuit references *Hurley* and observes that it cites regulations aimed at expressive activities. *Hurley* was not a case, as was *O'Brien*, where the regulation was not directed at speech at all and the impact on expression was incidental to an otherwise legitimate governmental purpose. The City's junked vehicle ordinance is not aimed at regulating speech at all but at abating health and safety concerns. The Petitioners and Amici mischaracterize the Fifth Circuit's ruling in an attempt to make it attractive for this Court to hear the case. However, the specter of subjective determinations of "great works of art" by the court has nothing to do with the holding. Under *O'Brien*, the City's junked

vehicle ordinance does not violate the First Amendment.

ARGUMENT

I. First Amendment Does Not Exempt Junked Vehicles from Reasonable Regulations.

The City of San Marcos Code of Ordinances, Chapter 34, regarding junked vehicles is not directed in any way, shape, or form at regulating expression and an effect on expression was not even contemplated in its creation. Pet. Writ of Cert. App. 20-21, 29. The City's junked vehicle regulations are aimed very clearly at reducing blight, addressing health and safety issues such as preventing the harboring of vermin, rodents, and other animals which potentially pose health risks, avoiding reductions in property values, preventing fire hazards, and avoiding attractive nuisances for children. Pet. Writ of Cert. App. 25. Judge Sparks specifically held as such which the Fifth Circuit affirmed based on the record.

Specific factual findings determined by Judge Sparks and supported in the record include the fact the City has been battling problems with junked vehicles for years; over 1300 within a two year period prior to suit. Specific instances included some cases where children were using the vehicles as forts and at least one case where a child became locked inside an abandoned vehicle. Pet. Writ of Cert. App. 25.

The trial court found "[j]unked vehicles are an attractive nuisance to children. Rodents, pests, and weeds thrive in and around them." Pet. Writ of Cert. App. 11-12. The municipal court and U.S. District Court held the ordinance also tends to reduce urban blight, vandalism, and the depressing effect of junked vehicles on property values. "Petitioners' insistence that the car-planter has been rendered safe is immaterial to the constitutionality of the ordinance. The City's right to regulate junked vehicles, not the individual status of each vehicle, is the concern of First Amendment inquiry." *Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010) (citing to *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990)); Pet. Writ of Cert. App. 12.

Judge Sparks additionally and explicitly found that while "Plaintiffs allege the car planter's 'dominant purpose' is expressive . . . it is not a 'pure statement' of Plaintiffs' beliefs about car culture, but is also both a planter and a distinctive symbol of the Planet K business . . . [t]he 'artcars' are a part of Planet K's corporate culture and public image. . . . [a petition by customers] expressly links the car planter to Planet K's corporate history." Finally, the "car planters are closely associated with Planet K" and is a corporate icon. Pet. Writ of Cert. App. 27-28. As a result, the desire by the Petitioners to have this junked vehicle and public nuisance visible from the street in front of the Planet K store has more to do

with their business model than with a desire to bring art to the public.

Numerous legitimate, important, and substantial governmental interests exist to support the City's junked vehicle regulation, which mirrors the State of Texas' junked vehicle statute. Tex. Transp. Code Chapter 683, Subchapter E. As a result, whether the junked vehicle is simply sitting by itself because the owner does not desire to move it, used to house graffiti, used as a corporate sign, used as a canvas for artwork, or used as a symbolic message, the legitimate purposes behind the ordinance should allow reasonable regulations to protect public health and welfare. Even though the City's health and safety regulations may have an incidental effect on the use of such an object for expression, the restriction is no more than necessary and the Petitioners still have adequate ample alternatives to express whatever message they desire.

This Court held in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), that "freedom of expression" does not include all modes of communication of ideas. *Id.* O'Brien was found guilty of burning his Selective Service registration certificates on the steps of the South Boston Courthouse. He argued this act was symbolic speech and protected by the First Amendment. The Court found that the government may regulate aspects not aimed at communication as long as the governmental interests are important and the regulation is aimed at achieving its goals.

The *O'Brien* Court held:

> (W)hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . (A) government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. . . .

United States v. O'Brien, 391 U.S. at 376-77.

This Court examined in another type of First Amendment case in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), laws of general applicability which incidentally burden First Amendment rights are not subject to the narrowly tailored or compelling interest standards, but are subject merely to a rational basis review. This type of test has been adopted for junked vehicle ordinances in other Circuits. The Eighth Circuit, in *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977), utilized the *O'Brien* test in upholding a junked vehicle ordinance. In *Davis*, the City of Pine Bluff attempted to enforce its junked vehicle ordinance against Davis, who displayed a wrecked vehicle in which his son was killed during a high-speed police

chase, in his front yard as a symbolic political protest against abuse of police authority.

The Eighth Circuit, after quoting the *O'Brien* standards, held that:

> The ordinance serves the basic purpose of protecting the community from the health and safety hazards created by abandoned, wrecked and inoperable vehicle. The effectuation of this objective by requiring enclosed storage is within the constitutional power of the city and furthers important and substantial government interests. Also the furtherance of these interests is unrelated to the suppression of free expression. Both the governmental interest and operation of the ordinance are limited to the noncommunicative aspect of Davis' conduct.

Id. at 191.

The Petitioners attempt to distinguish *Davis* by asserting Davis "did nothing to transform the wreck into a genuine expressive work of art" Pet. Writ of Cert. 2, fn. 4. Apparently, Petitioners believe that artistic expression should have more First Amendment protection than the political/symbolic speech at issue in *Davis*. Political speech is one of the highest categories of protection under the First Amendment yet it was still subject to reasonable regulation in *Davis*. The issue is not the type of speech, but the type of regulation. Junked vehicles, as a category, pose numerous health, safety, and other problems for citizens. Regulations of junked vehicles are not

geared nor intended to have any impact on expression.

In truth, any object or item can be utilized as a medium to express a view. Citizens cannot exempt objects of health and safety regulations simply by utilizing them in expressive ways. Imagine if an individual wished to protest a City's solid waste contract and utilized garbage (discarded food, waste, plastic, etc.) in his front yard to spell out a political message; or if he used it to create a compost sculpture out of artistic motivation. The use of such a medium can cause rodents, vermin, and disease issues, is unsightly, and can affect property values.

An ordinance which requires all trash to be bagged, placed in approved trash containers and not placed in the front yard (only on the curb) unless it is trash pickup day is a reasonable regulation not aimed at suppressing speech. Cities have no interest in what message is expressed utilizing garbage as a medium (if they even contemplate expression using the medium) they just want to avoid the negative community consequences of the use of garbage for anything other than a landfill. Requiring such regulations to withstand strict or even intermediate scrutiny under the First Amendment (when the regulations do not even contemplate any regulation of speech) can result in obstructive results. The *O'Brien* factors properly balance the interests and allow for the proper result.

When the expressive component of an object subject to a general regulation (which was not aimed

at regulating speech) is secondary to its primary function, the object is subject to reasonable regulations without offending the First Amendment. Such regulation is permissible even if it has an incidental effect on expression. Judge Sparks made the specific factual finding that artistic expression was not the dominant element of the junked vehicle. Whether the secondary expressive component is political, artistic, graffiti or a great work of art is irrelevant.

Health and safety regulations, such as a garbage ordinance or junked vehicle ordinance, are not written to regulate speech at all. They are therefore not designed to be interpreted under First Amendment tests and such tests should not be applied to them in the traditional sense. Unlike *Hurley* and *Bery v. City of New York,* 97 F.3d 689 (2nd Cir. 1996) (cited by Petitioners), which involved laws aimed at regulating areas of expression, *O'Brien*, *Davis*, and the City of San Marcos all utilize ordinances which have nothing to do with the regulation of expression. San Marcos is regulating nuisances and health and safety concerns. It does not care what is painted on the junked vehicle, if anything. It regulates all junked vehicles the same since they all have the same health and safety concerns. Painting the junked vehicle does not eliminate the concerns; neither does the Petitioner's contention that their particular vehicle is safe. Since *any* object can theoretically be utilized as a medium for expression, requiring all regulatory ordinances to withstand First Amendment challenges goes against the precedent set forth by this Court in *O'Brien*. The First

Amendment does not exempt junked vehicles from regulation.

II. Alternate Motives and Avenues of Expression

Planet K is attempting to utilize the First Amendment to protect a corporate symbol which augments its advertising. It wants to keep the junked vehicle exactly as it is and visible to travelers on the roadway for business purposes. As argued above, the junked vehicle is not subject to the same type of First Amendment analysis articulated in *Hurley* or *Bery*; *O'Brien* and *Davis* control.

However, to the extent Petitioner Kleinman desires to display the artistic component of the junked vehicle, he can still do so. Numerous alternative avenues of expression exists which still allow the City to address its health and safety concerns.

A photo or display of the junked vehicle can convey the same message. The junked vehicle can be displayed in a building, tent, or other area and can be open to the public for display. Judge Sparks specifically held "the Court finds an enclosed space, open to the public, on the Planet K lot is an adequate alternative channel of expression." Pet. Writ of Cert. App. 30-31. The Petitioners do not enjoy a constitutional right to every method of display they desire or unrestricted access to a specific audience (i.e. drivers along IH-35). The Fifth Circuit, after examining

the record, determined these findings were not clearly erroneous and were supported.

Petitioner Kleinman does not want the junked vehicle shielded from the public right-of-ways as that reduces its commercial application – which is his true underlying intent and purpose. His proposition is that by labeling his corporate icon as "art" he should be exempt from sign regulations, exempt from placement regulations, and exempt from health and safety regulations. However, the intricate individual paintings on the car/planter cannot be seen from the expressway. Pet. Writ of Cert. App. 31-32. The only way an individual can see the images is to be up close to it, in person. The iconic image of a smashed vehicle with bright colors and cacti growing out of it, however, can be seen from the roadway and lets travelers know there is a Planet K nearby. Pet. Writ of Cert. App. 31-32.

Under *O'Brien* and *Davis*, the Fifth Circuit need not have addressed the alternative channels of expression prong. However, it still went through the analysis out of an abundance of caution. Judge Sparks specifically found "[e]nclosing the car planter does not cut off public access to the car planter . . . [the City's ordinance] leaves open ample opportunity to display the car planter to patrons of Planet K and any other individual who cares to come inside the screening structure to look at it . . . the requirement that the car be enclosed does not prevent Plaintiffs from advertising the existence of the car planter to

passersby and inviting the general public to come in and view the piece." Pet. Writ of Cert. App. 30-31.

Judge Sparks also specifically noted:

> Of course, enclosing the car planter means the only people who will receive its message are those who accept this invitation. Plaintiffs will not be able to display the car planter to the drivers passing on Interstate 35, whom Plaintiffs contend are a crucial part of their audience. The Court finds, however, that although these drivers may be part of the audience Plaintiffs wish to reach, the medium of the junked car cannot plausibly be considered an essential part of the expressive content Plaintiffs wish to convey to this group. Dr. Bedmar conceded on cross examination that a driver passing on Interstate 35 would likely be unaware of the car planter's nature as a "junked car," and would see only a brightly painted car with some plants growing in it. To the extent "the medium is the message" in this case, the only audience who receives the unique message of the junked car consists of those who are close enough to see the fact that the car planter is a destroyed automobile. These are people who have already elected to come onto the Planet K lot.

Pet. Writ of Cert. App. 31-32

If this Court wishes to examine the junked vehicle ordinance as a reasonable time, place, and manner restriction, the ordinance still passes muster.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) this Court set forth the standards when dealing with the proper balance of a regulatory ordinance and its impact on the First Amendment.

The Court in *Ward* specifically held that:

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Id. at 800 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Unlike this case, or *O'Brien* and *Davis*, the ordinance in *Ward* was one which did regulate expressive activity. To the extent a junked vehicle ordinance can be analyzed as a valid time, place or manner restriction on First Amendment expression, the City's regulation is still legitimate. The prohibitions on junked vehicles are directly tied to significant and important governmental interests. The restriction of the display of the nuisance only from the public right-of-ways is sufficiently narrow enough

to address the City's concerns yet still leaving open ample alternative channels. Judge Sparks made specific factual determinations that Petitioners have alternative channels sufficient to allow whatever message the Petitioners desire to express. Petitioners had the right to still leave the vehicle on-site but to shield it from view or invite individuals into an enclosed structure. There is no risk that this standard, devised to deal with junk and nuisances, will open some floodgates of speech regulation when any ordinance directed at speech must meet a more strenuous standard. No threat to great art, or even average art, is presented.

Regardless of what images are painted on the junked vehicle, it remains a junked vehicle with the same health and safety concerns as any other junked vehicle. As such, it is subject to the City's reasonable regulations. Petitioner Kleinman does not want it screened from the roadway as that restriction reduces the promotional advertising effect. The reduction, however, does not mean that acceptable and constitutional alternative channels are foreclosed. They exist. He is simply not happy with them.

III. Standing

Petitioner Kleinman is the only party who actually has standing to petition this Court to review the claims asserted. The general rule is that "a litigant may only assert his own constitutional rights or

immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960).

By stipulation, Petitioner Kleinman is the owner of the junked vehicle at issue in this case. Pet. Writ of Cert. App. 60 (Stip. 15). Petitioners Wade and Travis do not own or have a legal interest in the junked vehicle made the subject of this dispute. Their own standing came from VARA which they did not pursue in their Petition. As a result, they have no standing under the First Amendment. Constitutional rights are personal and may not be asserted vicariously. *See McGowan v. Maryland*, 366 U.S. 420, 429-430 (1961).

CONCLUSION

The City of San Marcos' junked vehicle ordinance is not designed to regulate expression but to address numerous nuisance and health and safety concerns. Those concerns exist regardless of what, if anything, is painted on the vehicle. Under the *O'Brien* factors, the City has numerous legitimate governmental interests in prohibiting junked vehicles, the regulation is not aimed at regulating speech, and it no more restrictive than necessary to accomplish its goals. As a result, it does not offend the First Amendment. The Petitioners' out of context assertion that the Fifth Circuit somehow held that the First Amendment only applies to great works of art is not only false but is nothing more than an attempt to distract this Court into agreeing to hear this case when such

consideration is not necessary. A straightforward reading of the Fifth Circuit's opinion reveals it stands for no such proposition.

O'Brien and *Davis* control. As such, the City's junked vehicle ordinance is constitutional under well settled First Amendment jurisprudence. To the extent *O'Brien* does not control, the City's ordinance is still valid under *Ward*. The Fifth Circuit did not deviate from any constitutional standards and its opinion should remain intact. This Court should deny the Petitioners' Writ for Certiorari in its entirety.

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Supreme Court, U.S.
FILED
AUG 17 2010
OFFICE OF THE CLERK

No. 09-1494

In The
Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE
and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. BY THE CITY'S STIPULATIONS AND THE UNCONTESTED EVIDENCE, THE ARTWORK IS EXPRESSIVE AND THE ORDINANCE BANS ITS PUBLIC DISPLAY.

This Court has not directly articulated the proper First Amendment analysis for restrictions, allegedly motivated by non-speech concerns, on public display of visual art. The absence of guidance has led to a circuit split.

The City of San Marcos does not defend the Fifth Circuit's primary holding: that while the First Amendment may protect "great works of art," it is not applicable in "every case involving visual non-speech expression."

The City *does* defend the Fifth Circuit's alternative rationale under a flawed First Amendment analysis. Therefore, even the City acknowledges that this case squarely presents the second Question Presented:

> May a city wholly ban the public display of an entire category of art, leaving enclosed, private display as the only available option?

It is uncontested that the artwork at issue is expressive. It is also uncontested that the City's ordinance enacts a citywide ban of public display of any artwork incorporating a junked vehicle. These uncontested facts therefore present an important question for this Court to resolve – is the display of

art, visible to the public passing on streets and sidewalks, subject only to "time, place and manner" restrictions, or may it be entirely banned from the public arena if a city claims a generalized "health and safety" concern purportedly unrelated to the suppression of speech?

A. The Artwork is Expressive.

Respondent refutes its own stipulations and argues with uncontested evidence in its effort to claim the artwork is not primarily expressive but is, instead, "functional" and therefore entitled to no or lesser First Amendment protection.

Respondent claims that Petitioner Kleinman's "true underlying intent and purpose" was commercial, not artistic. Resp. at 12, 15. This assertion lacks any record citation, for good reason. There is no evidence or finding that the Petitioners' intent was commercial. Respondent *stipulated* that "Kleinman had always intended to turn the donated vehicle into an artwork planter," and that each artist intended his artwork to convey ideas about transforming a polluting object into a life-giving thing of beauty. App. 62-63.

Nor, contrary to Respondent's claim (again without citation), did the District Court "make the specific finding that artistic expression was not the dominant element" of the work. Resp. at 10. Rather, the District Court saw "both expressive and functional elements," App. 28, in that the work conveyed the artists' meaning while also, the District Court believed, being "closely associated with Planet K." App. 29.

The artwork carries no advertisement for Planet K, and the artists were free to create their own work. App. 65-66. But, significantly, even the "function" seen by the District Court was itself *expressive*: the District Court concluded that the artwork had become "a distinctive symbol of the Planet K business." App. 28. Symbolism is expression entitled to First Amendment protection. *E.g.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (black armbands symbolic protest of Vietnam conflict).

The District Court properly rejected Respondent's assertion that the artwork was "commercial speech," App. 28, as well as Respondent's argument that the artwork "is outside the scope of First Amendment protection, or that it is subject to less than intermediate scrutiny." App. 29. The statue of Atlas at Rockefeller Center is no less artistic or expressive because it is also associated with NBC, the center's primary tenant.

Respondent also argues with the uncontested facts by repeatedly, and wrongly, claiming that the artwork here poses the same health and safety concerns as any junked vehicle. *E.g.*, Resp. at 10. In fact, the gasoline and oil were drained, the glass removed, the doors welded shut, the hood and trunk removed, and the interior filled with dirt and cacti, making it impossible for children to get locked inside or use the car as a "fort." App. 60. This matters. When a government attempts to apply even a facially-neutral regulation in a way that restricts expression, whether

the particular expression poses the dangers that the government has an interest in regulating is considered. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 410 (1989) (conviction of peaceful protestor for burning American flag violates First Amendment because "the State's interest in maintaining order is not implicated on these facts").

Respondent misses this point in offering a "parade of horribles" argument that ruling in Petitioners' favor would require the City to allow a citizen to strew garbage in his front yard in protest of solid waste policies. Resp. at 9. The proper analogy would be the transformative use of material typically considered "garbage" in a piece of expressive art that poses none of the dangers that justify governmental regulation; such an art piece, like Petitioners' artwork, would be constitutionally protected.

B. The Ordinance Enacts a Citywide Ban on Public Displays of Art.

Respondent's focus on the artwork's location and its purported association with Planet K is designed to draw attention from the ordinance's citywide ban on an entire medium of artwork.

The ordinance bans the public display of Petitioners' artwork *anywhere* in San Marcos. Petitioners cannot legally move their work to a private residence, to a sculpture garden, or even to a museum with windows, if it can be seen from any sidewalk, street, or right-of-way. Car art cannot be displayed in traditional public forums for free expression such as parks

or sidewalks. *Boos v. Barry*, 485 U.S. 312, 318 (1988). "In such places, which occupy a 'special position in terms of First Amendment protection,' the government's ability to restrict expressive activity 'is very limited.'" *Id.* (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). The artwork's location near the Planet K store was therefore immaterial to the First Amendment injury imposed by the Respondent's citywide ban.

Similarly, any purported association between this artwork and Planet K is immaterial. *Any* artwork made from a "wrecked, dismantled, partially dismantled or discarded" vehicle (or its parts) is banned. Remove the association between this artwork and Planet K, and the ordinance *still* bans any public display.

Outright bans on a medium of speech are heavily disfavored:

> Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.

City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

Respondent simply ignores the amicus briefs filed in support of Petitioners. These artists, art museums, and art associations all recognize that the ordinance enacts a wholesale prohibition against

public displays of even "pure" art – whatever that might be – made using an idiosyncratic, but well-recognized, artistic medium. Brief of Amici Curiae Texas Civil Rights Project, *et al.*, at 23; Brief of Amici Curiae Texas Accountants and Lawyers for the Arts, *et al.*, at 16.

II. THE CITY CANNOT REFRAME THE QUESTION TO AVOID THE FIRST AMENDMENT.

Respondent does not try to defend the proposition that only "great works of art" receive First Amendment protection, but rather denies that the Fifth Circuit made such a holding. Resp. at 3. But it did so hold, as shown both by the language of its opinion and the grave concerns about the ruling expressed by the artists and art groups who filed amicus briefs.

A. The Fifth Circuit's Ruling.

The Fifth Circuit, claiming a lack of guidance due to "the law's vagueness," declared that the category of material entitled to First Amendment protection "is not so unbounded" as to encompass all visual art. App. 6. The Circuit Court distinguished *Hurley v. Irish-American GLB Group of Boston*, 512 U.S. 557 (1995), because it "refers solely to great works of art" and declared that "[n]either in *Hurley* nor in any later case has the [Supreme] Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." App. 7. The Court then concluded that the artwork – which

it gratuitously characterized as "a three-dimensional advertisement for a novelty shop" -- was entitled to no First Amendment protection at all. App. 9.

The Fifth Circuit purported to "share the *Mastrovincenzo* court's skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression." App. 9. But the Second Circuit in *Mastrovincenzo* did not reject constitutional analysis. That Court held that the plaintiff's goods – decorated baseball caps and t-shirts – "serve a predominantly expressive purpose, and their sale is consequently protected under the First Amendment." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2nd Cir. 2006). It upheld the city's denial of a vendor's permit only *after* determining that application of the permitting ordinance to the plaintiff satisfied intermediate scrutiny under *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by leaving open adequate alternative channels of public communication, including "reaching public audiences on the sidewalks" by "personally distributing their art to the public free of charge" or "enlist[ing] licensed vendors to sell their clothing." 435 F.3d at 101.

B. Respondent's Argument.

Respondent takes a different tack to avoid constitutional scrutiny, arguing that if an ordinance is not written with the intent to regulate speech, then any "reasonable" government purpose upholds

the ordinance, regardless of its impact on speech. Resp. at 4-10.

The City displays a fundamental misunderstanding of important free speech principles. For example, the City suggests without explanation that the free-exercise case of *Employment Div. v. Smith* is somehow relevant (Resp. at 7); that *Smith*'s "rational basis" test is the same as the *O'Brien* test for expressive conduct (*id.*); and that *O'Brien*'s analysis is not a "First Amendment test[ ] . . . in the traditional sense" (Resp. at 10). All of these assertions are wrong. *Smith* itself notes that application of its standard to a free speech case would be incorrect. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990). *O'Brien* applied a First Amendment intermediate scrutiny test requiring a substantial governmental interest and a narrowly tailored regulation (unlike *Smith*). *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Because the Petitioner's artwork is expressive and has no "function" other than expression, and because the City's ordinance dictates where that expression may be displayed, the appropriate test is the "time, place, and manner" analysis of *Clark* and *Ward*, including the requirement that the City leave open ample alternative channels of communication. Even if the public display of artwork is considered "expressive conduct" and *O'Brien* applies, the ordinance is not narrowly tailored and thus fails under that test as well.

III. THE CITY CANNOT WISH AWAY THE CONFLICT WITH THIS COURT'S DECISIONS AND THE SUBSTANTIAL CIRCUIT SPLIT CAUSED BY THE FIFTH CIRCUIT'S DECISION.

A. Conflict with this Court's Precedent.

Respondent argues that *Hurley* and *Bery* are distinguishable because they "involved laws aimed at regulating areas of expression," unlike the junked vehicle ordinance here. Resp. at 10. They did not. *Hurley* involved a state law outlawing discrimination in public accommodations, and *Bery* involved a generally-applicable municipal vendor permitting ordinance. *Hurley*, 515 U.S. at 561; *Bery v. City of New York*, 97 F.3d 689, 692 (2nd Cir. 1996). Neither of those regulations had the purpose of regulating expression; they only regulated conduct, yet they were subjected to "as applied" challenges when they burdened expression. *Hurley*, 515 U.S. at 572; *Bery*, 97 F.3d at 697.

Respondent cites no case from any court authorizing a total ban on public display of artistic expression using a particular medium. Indeed, "[b]ecause time, place and manner regulations must 'leave open ample alternative channels for communication of information,' a total ban would necessarily fail [intermediate scrutiny]." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 321 (2000) (Opinion of O'Connor, J.) (quoting *Ward*, 491 U.S. at 791).

"[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'" *City of Ladue*, 512 U.S. at 56. Respondent cites no case from any court holding that this standard can be met without providing any right to speak publicly. This Court's case law is to the contrary. For example, in *Frisby v. Schultz*, 487 U.S. 474, 483-84 (1988), a prohibition against picketing in front of a residence was saved only by a construction of the ordinance that permitted "[m]arching through residential neighborhoods, or even walking a route in front of an entire block of houses," therefore leaving the required "ample alternative" methods of speaking publicly.

Finally, Respondent ignores the significant fact that the Petitioners' artwork was displayed wholly on private property, where this Court has held that a private citizen's interest in expression is stronger and the government's interest in regulating is weaker. As this Court noted when invalidating the application of a municipal ordinance to a sign on private property,

> [d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the

> same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

City of Ladue, 512 U.S. at 56-57. While the government must "mediate among various competing uses" for public streets and facilities, its need to regulate speech from private property "is surely less pressing." *Id.* at 58.

B. Circuit Conflict.

Respondent ignores the Fifth Circuit opinion's conflict with the Ninth Circuit's 2009 *en banc* decision in *Berger v. City of Seattle* and its multiple opinions debating whether *sixteen* locations in a public park provided the ample alternative channels of communication required by this Court's holdings in *Ward* and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *Berger*, 569 F.3d 1029, 1076, 1088 (9th Cir. 2009). Respondent's ordinance – which leaves no public forum whatsoever available for Petitioners' expression – would fail *any* of those opinions' standards, majority and dissents.

Respondent's only effort to distinguish the Second Circuit's *Bery* decision is the incorrect claim that the generally-applicable New York City vendor ordinance was "aimed at regulating areas of expression," when it was clearly directed at regulating the sale of

goods on public sidewalks, and incidentally limited the sale of expressive merchandise.

Respondent's claim that Petitioners have an adequate alternative channel of communication due to their "right" to "leave the vehicle on-site but to shield it from view or invite individuals into an enclosed structure" (Resp. at 15) directly conflicts with *Bery*'s holding that the alternative channel of communication standard requires access to a *public* audience. *Bery*, 97 F.3d at 698 ("[T]o tell appellants that they are free to sell their work in galleries is no remedy for them.").

Respondent relies heavily on *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977), decided before *Clark* and *Ward* made clear that content-neutral regulations must leave open ample alternative channels of communications. Respondent argues that the junked car in *Davis* was "political expression" that is more highly valued than "artistic expression." Resp. at 8. But *Davis* involved no "expression" other than the vehicle owner's subjective assignment of meaning to wreck. There was no stipulation that the wreck in *Davis* conveyed *any* meaning, let alone artistic meaning. The unaltered wreck in *Davis* also posed health and safety dangers not present in this case.

Respondent's *Davis* argument is doubly questionable: Respondent cites no authority suggesting that artistic expression enjoys less protection than political expression, and the work at issue here *was*

both "artistic" and "political." It bears the words "make love not war" around the gas cap and conveys the creators' ideas about pollution, environmental degradation and dependence upon foreign oil – and the City stipulated that for each creator, the use of the junked vehicle was "integral to his expression." App. 61-62. Even if *Davis* were correct, it merely emphasizes the conflict between this case, *Davis*, *Bery* and *Berger*.

IV. THE ARTISTS HAVE FIRST AMENDMENT STANDING.

Respondent argues, for the first time, that artists Scott Wade and John Travis lack standing because they "do not own or have a legal interest" in the artwork. Resp. at 16. This is factually and legally incorrect.

Although Michael Kleinman owns the object on which their works were painted, the artists own the copyright to their respective contributions. App. 61; 17 U.S.C. § 201(a), (c); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (commissioned sculpture is not "work for hire" and thus artist retains copyright in work). The City's ban on public display of their artwork therefore directly injures their rights as copyright holders. *See* 17 U.S.C. § 106 (listing copyright owner's exclusive rights).

Moreover, the Court relaxes standing requirements in freedom of speech cases because "application of those rules would have an intolerable, inhibitory

effect on freedom of speech." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972).[1]

Wade and Travis therefore have standing.[2]

CONCLUSION

This Court should grant review to clarify the First Amendment standards applicable to public display of visual art, and hold that Respondent's city-wide ban of a medium of expression is unconstitutional.

Respectfully submitted,

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[1] In *United States v. Raines*, 362 U.S. 17 (1960), cited by Respondent, this Court noted that the very principle cited by Respondents – that "a litigant may only assert his own constitutional rights or immunities" – does not apply "where the application of these rules would itself have an inhibitory effect on freedom of speech." *Raines*, 362 U.S. at 22.

[2] As Petitioner Kleinman unquestionably has standing, this question does not impact this Court's jurisdiction.

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No. 09-1494

Supreme Court, U.S.
FILED
JUL 6 2010
OFFICE OF THE CLERK

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BRIEF OF *AMICI CURIAE* TEXAS ACCOUNTANTS AND LAWYERS FOR THE ARTS; VOLUNTEER LAWYERS & PROFESSIONALS FOR THE ARTS; NORTHWEST LAWYERS AND ARTISTS; COMIC BOOK LEGAL DEFENSE FUND; ARTCAR FEST; ART HISTORIAN DOUGLAS NICKEL, PHD; INDIVIDUAL ARTISTS; AND COLLEGE ART ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment protect only "great works of art"?[4]

[4] *Amici curiae* agree with Petitioners that the Fifth Circuit also erred when it held that Respondent could ban any public display of the artwork even if it was worthy of First Amendment protection in the Fifth Circuit's eyes. *See* Pet. at 13-16. *Amici*, therefore, urge the Court to grant certiorari on both questions presented in the petition. To avoid duplicative argument, *amici* are focusing on the first question presented: "Does the First Amendment protect only 'great works of art'"?

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INTEREST OF *AMICI CURIAE*

Texas Accountants and Lawyers for the Arts

The Texas Accountants and Lawyers for the Arts (TALA) was formed in 1979 to meet the legal and accounting needs of artists and nonprofit organizations.[1] TALA provides free legal and accounting services to arts nonprofits and artists from all creative disciplines, including visual artists, musicians, actors, dancers, filmmakers, and writers. Over 600 attorneys and accountants donate their time to artists and nonprofit organizations that are unable to afford professional services. TALA is concerned that, if the Fifth Circuit's decision is not reversed, the artists that it assists will not be protected by the First Amendment unless their work is deemed "great." Given the relatively small number of artworks that – by definition – can be considered "great," this means that the vast majority of the artists that TALA assists will have no First Amendment protection for their works.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No party, or counsel for any party, has authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* has not received any fee for – and has paid all costs associated with – preparing this brief. *See* S. Ct. R. 37(6).

Volunteer Lawyers & Professionals for the Arts

The Volunteer Lawyers & Professionals for the Arts – formerly Tennessee Volunteer Lawyers for the Arts – is a Nashville, Tennessee organization that provides pro-bono legal services to low-income artists of all disciplines, as well as legal and business assistance to emerging nonprofit arts organizations. It is part of the Arts & Business Council of Greater Nashville.

Northwest Lawyers and Artists

Northwest Lawyers and Artists (NWLA) is a Portland, Oregon organization that provides information and support to artists and arts organizations throughout the State of Oregon. NWLA's attorney board members provide hundreds of hours of reduced rate and *pro bono* services to artists. In addition, NWLA educates artists in Oregon through workshops and artist-friendly legal-education seminars.

Comic Book Legal Defense Fund

The Comic Book Legal Defense Fund is a nonprofit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians, and readers. When comic books began in the 1930s, few would have considered them to be "great" art. Today, however, some comic books are indisputably "great" art, with comics even having

been awarded the Pulitzer Prize. ART SPIEGELMAN, MAUS: A SURVIVOR'S TALE (1991). And recognized "great" artists, such as Roy Lichtenstein, have drawn inspiration from comic books. Because of comic books' particular history of scorn and attack – before eventual acceptance as an artform – the Comic Book Legal Defense Fund is particularly concerned about the Fifth Circuit's ruling that only "great" art is entitled to First Amendment protection.

ArtCar Fest

ArtCar Fest is a festival for and about ArtCars, which are licensed, registered and insured vehicles that an artist has permanently altered in an artistic fashion. The unique aspect of their medium is that these artists bring art into the world every day as they drive their vehicles to work, to the store, and on highways. ArtCar Fest is the only festival in the world that focuses exclusively on this medium, and the only one founded and run by ArtCar artists. More information on ArtCar Fest can be found at its website, http://www.artcarfest.com.

Art Historian Douglas Nickel, PhD

Douglas Nickel, PhD is the Andrea V. Rosenthal Professor of Modern Art at Brown University. He specializes in the history of photography and modern art. Prof. Nickel served ten years as a curator at the San Francisco Museum of Modern Art, where he organized traveling exhibitions on the work of Carleton

Watkins and Lewis Carroll. Prior to his arrival at Brown, he was director of the Center for Creative Photography and associate professor of art history at the University of Arizona in Tucson.

Individual Artists

Butch Hancock is a country music singer-songwriter and a member of The Flatlanders. In addition to his musical career, Hancock is an acclaimed visual artist whose photographs and ink drawings are contained in private collections and displayed in art galleries.

Kelly Lyles is a painter living in Seattle, Washington. Artcars are a special interest of Lyles. She features artcars in her works, and she has created several artcars that she regularly displays. An overview of Lyles' work can be found on her website, http://www.kellyspot.com/. Lyles' work has been featured in galleries throughout the country, as well as in books, magazines, newspapers, and television. Lyles displays her work – and the work of others – in public view on her own property.

Leo Aston is an artist in Houston, Texas. He creates sculptures from found objects, including palm fronds, discarded metals, musical instruments, doors, and furniture. He displays these objects on his property in public view.

Alan Pogue is a documentary photographer in Austin, Texas who heads the Texas Center for Documentary Photography. Pogue's work has appeared in publications throughout the country and the world, including The New York Times Magazine, the Boston Globe, the Washington Post, the Los Angeles Times, and Kyodo News in Japan. Pogue's work focuses on social justice.

Jan D. Elftman is an artist and educator in Minneapolis, Minnesota. Her artwork has been exhibited locally, nationally, and internationally. She is also the curator of the annual ArtCar Parade in Minneapolis presented by Intermedia Arts of Minnesota. Examples of Elftman's work can be found at her personal website, http://www.corktruck.com.

Philo Northrup is an artist in San Francisco, California. He is also the co-founder of ArtCar Fest. Northrup has been making ArtCars for 25 years and organizes ArtCar visits to schools, hospitals, and art venues throughout the country. His artwork has been exhibited at the California Museum of Art, San Jose Museum of Art, USC Museum of Art, Triton Museum of Art, Museum of New Mexico, the LACE Annualé, and the Bayannale.

Harrod Blank is a documentary filmmaker and artcar artist living in Berkeley, California. His works include the 1992 film *Wild Wheels*, which documents the artcar phenomenon in America, and the 1998 follow-up *Driving the Dream*, which focuses on the artists behind the cars. His films have been shown on

PBS, TBS, and in cities all over the country. He has created three art cars of his own: Oh My God!, Pico de Gallo, and The Camera Van. He is also co-founder of ArtCar Fest. Blank is currently renovating a building complex in Douglas, Arizona to become a museum and learning center for artcars, which will be called "Artcar World." Examples of Blank's work can be found at his personal website, http://www.harrodblank.com.

Emily Duffy is an artist in Northern California. She is also festival director for ArtCar Fest. Her artwork has been featured at the San Jose Museum, the Juste Pour Rire Festival, and The Petersen Museum. Duffy's BraBall sculpture (a 1,800 pound ball of brassieres) is part of the permanent collection at the American Visionary Art Museum in Baltimore.

Graydon Parrish is a painter in Austin, Texas. His style is a mix of classical realism and contemporary realism. His work can be found in the New Britain Museum of American Art, Austin Museum of Art, Tyler Museum of Art, Mead Art Museum, and private collections throughout the United States and Europe. Examples of Parrish's work can be found at his personal website, http://www.graydonparrish.com.

These artists are concerned about the effect that the Fifth Circuit's ruling that only "great" art is entitled to First Amendment protection will have on artists. They are concerned that if only what is deemed "great" art has First Amendment protection,

then the government can suppress art that it finds threatening.

College Art Association

College Art Association ("CAA") is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, conservators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching. CAA has a long-standing interest in issues relating to the First Amendment and the freedom of artistic and scholarly expression because its members create art, write about art, display art, and use art in the classroom and in published works. CAA asks that the Court grant the petition because CAA members have a substantial direct interest in governmental action that affects visual art and because the decision below predicates First Amendment protection on an insupportable inquiry into whether art is "great."

SUMMARY OF ARGUMENT

The Fifth Circuit held that only "great" art is entitled to First Amendment protection. While the court also considered – out of an abundance of caution – whether the artwork could be banned if it had First Amendment protection, its holding that only "great" art is entitled to First Amendment protection is binding on all courts within that circuit.

The Fifth Circuit's test will require courts to act as art critics and determine whether the artwork in question is suitably great to be entitled to First Amendment protection. History shows that it is difficult to determine whether artists and art are great. History is replete with examples of artists who were denigrated during their time, but who are regarded as great today.

By limiting First Amendment protection to only "great" art, the Fifth Circuit improperly bases constitutional rights on a court's subjective aesthetic judgment. This Court has warned that, in the First Amendment area, subjective judgments can be a public rationalization of an improper decision. Under the Fifth Circuit's test, there is a danger that government-approved art will receive First Amendment protection, while art that is not in favor will be deemed "not great," thus falling outside the First Amendment.

This Court should grant certiorari and hold that all works of art – wherever they may fall on the spectrum between ordinary and "great" – are fully

protected by the First Amendment because they have some expressive content.

ARGUMENT

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), this Court considered whether a parade was entitled to First Amendment protection. This Court noted that it had often held that symbolic speech was protected, and it recognized that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* This Court held that if such protection turned on the articulation of a particular message, then the First Amendment "would never reach the *unquestionably shielded* painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.* (emphasis added). The obvious point of this Court's examples was to demonstrate that abstract works of art – visual, musical, or even nonsense verse – are fully protected by the Constitution, even though an overt message is not being communicated.

The Fifth Circuit asserted that this Court's invocation of Pollock, Schönberg, and Carroll effectively limited the scope of First Amendment protection. Rather than recognizing that the Court cited these examples for the proposition that artworks are entitled to First Amendment protection even when their meaning is not particularized or readily apparent, the

Fifth Circuit held that the First Amendment protected only "great works of art." *Kleinman v. City of San Marcos*, 597 F.3d 323, 326 (CA5 2010). Because the Fifth Circuit first determined that the artwork in this case was not "great" or "fine" art – which then informed its view that the work did not serve predominantly expressive purposes – the court held that it was not protected by the First Amendment and could be regulated by the City. *Id.* at 326-27.

This Court should grant certiorari and hold that all works of art – wherever they may fall on the spectrum between ordinary and "great" – are fully protected by the First Amendment because they have some expressive content.

I. The Fifth Circuit held that only "great works of art" are entitled to First Amendment protection.

The City of San Marcos may argue that the Fifth Circuit did not really hold that only "great" works of art have First Amendment protection. It may focus on the Fifth Circuit's First Amendment analysis of the artwork at issue and its application of the intermediate-scrutiny test to hold that the City's restrictions were permissible as applied. *Id.* at 328-29. But that would not be an accurate characterization of the Fifth Circuit's opinion. Petitioners argued that "visual art" is protected by the First Amendment, *see id.* at 326, but the court of appeals

expressly rejected that contention by holding that only "great" art is entitled to full First Amendment protection. Although the standard established by the Fifth Circuit is novel and untethered to any precedent of this Court, its opinion is binding on federal courts in that circuit. *United States v. Wright*, 496 F.3d 371, 375 n.10 (CA5 2007).

The Fifth Circuit also asserted that neither in *Hurley*, nor in other cases, has this Court "elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." *Kleinman*, 597 F.3d at 326. Regardless whether this Court has done that in so many words, other courts of appeal and lower courts have been guided by this Court's precedents to conclude that works of visual art are fully protected by the First Amendment, without regard to whether they meet the test of "greatness."[2] The breadth and scope of that protection is amply demonstrated in the Brief of *Amicus Curiae* Texas Civil Rights Project filed in this case. *See* Brief of *Amicus Curiae* Texas Civil Rights Project in Support

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[2] *See, e.g.*, *White v. City of Sparks*, 500 F.3d 953, 956 (CA9 2007) ("So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective."); *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 924 (CA6 2003) (First Amendment protection includes "paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (CA2 1996) ("paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection").

of Petitioners at 7-9, *Kleinman v. City of San Marcos*, No. 09-1494 (U.S. July 8, 2010).

The Fifth Circuit determined that the artwork was entitled to no First Amendment protection because it was not "great." *Kleinman*, 597 F.3d at 326-27. Only out of what it called "an abundance of caution" did the Fifth Circuit even consider whether public display of the artwork could be banned if it had First Amendment protection. *Id.* at 328.

Under Fifth Circuit precedent, each of these determinations is an alternative holding. In the Fifth Circuit, an alternative holding is a binding decision of the court and is not dicta. *Wright*, 496 F.3d at 375 n.10 ("But it's well-settled that alternative holdings are binding, they are not dicta"). So, the Fifth Circuit's holding that only "great works of art" are entitled to the full protection of the First Amendment is binding on all federal district courts in Texas, Mississippi, and Louisiana. It is also binding on all panels within the Fifth Circuit itself, unless the Fifth Circuit reconsiders the issue *en banc* or this Court acts. *See Santos-Sanchez v. United States*, 548 F.3d 327, 334 (CA5 2008). The Fifth Circuit declined to reconsider the issue *en banc* in this case, so this Court is the only avenue left. App. 56.

II. Limiting First Amendment protection to "great" art improperly bases constitutional rights on a court's subjective aesthetic judgment.

"What is art?" is one of the perennial philosophic questions. An entire philosophic discipline – aesthetics – is devoted to its inquiry. *See* ROBERT STECKER, AESTHETICS AND THE PHILOSOPHY OF ART: AN INTRODUCTION (2005). Despite wrestling with the question since at least Plato, there is no agreed-upon answer. *See* ALEXANDER SESONSKE, WHAT IS ART? AESTHETIC THEORY FROM PLATO TO TOLSTOY (1965).

The question "What is *great* art?" raises the inquiry by an order of magnitude. Yet that is what the Fifth Circuit requires as a threshold inquiry in any First Amendment case where art is involved. Before a district court in the Fifth Circuit can decide whether government action restricting a particular artwork is valid, it must first act as art critic and philosopher to determine whether the work not only is art that communicates protected expression, but also is "great" art.

A. History shows that it is difficult to determine whether artists and art are "great."

The history of art is replete with examples of artists who are today universally acclaimed as great, but who were not regarded that way during their own time.

Paul Cézanne, Vincent van Gogh, and Paul Gauguin are today regarded as the giants of post-impressionism. *See generally*, JOHN REWALD, POST-IMPRESSIONISM: FROM VAN GOGH TO GAUGUIN (1978). But their contemporaries did not always recognize the greatness of their art. For example, Kenyon Cox, a prominent American painter and critic of their day, was dismissive of their work.[3] Cox said that Cézanne was "absolutely without talent," van Gogh was "too unskilled to give quality to an evenly laid coat of paint," and Gauguin was a "decorator tainted with insanity." MILTON W. BROWN, THE STORY OF THE ARMORY SHOW 159 (1988).

Although Henri Matisse is today one of the most celebrated artists of the twentieth century, he was not considered "great" by many critics in his day. JOHN ELDERFIELD, HENRY MATISSE: MASTERWORKS FROM THE MUSEUM OF MODERN ART 8 (1996). As one scholar has noted, the contemporary criticism of Matisse "was angry, vicious, and almost psychotic in its ferocity." THE STORY OF THE ARMORY SHOW 168. Even The New York Times described Matisse's works as "ugly," "coarse," and "revolting in their inhumanity." *Id.* at 171-72.

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[3] H. WAYNE MORGAN, KENYON COX, 1856-1919: A LIFE IN AMERICAN ART ix (1994) ("In the first two decades of [the twentieth] century Kenyon Cox was among the best known cultural figures in the United States. This reputation rested on his activities as a painter and critic.").

What we now consider as great works of art have not merely been slow to reach acceptance, but have, at times, been met with actual hostility. Among the most famous examples of this is the reaction to the music and ballet *The Rite of Spring*. Today, many consider Igor Stravinsky's music "the most important and influential musical work of the twentieth century," but that was not the immediate reaction of the audience at the premiere.[4] When the work premiered in Paris in 1913, the audience was so shocked by the music and ballet that it rioted. 18 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (Stanley Sadie ed.) (1980).

The problems inherent in the Fifth Circuit's test are nicely illustrated by the United States Government's own difficulties in deciding what is art, let alone art that is "great." Constantin Brancusi is "the most widely admired sculptor of our time." Margherita Andreotti, *Brancusi's Golden Bird: A New Species of Modern Sculpture*, 19 MUSEUM STUDIES No. 2 at 135 (1993). Yet the United States Customs Service was not always a fan. In the 1920s, Brancusi shipped his *Bird in Flight* sculpture to a collector in the United States. Under customs law at the time, art works were duty free. *Art: Custom House Esthetes*, TIME, Dec. 17, 1928 (available at http://www.time.com/time/

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[4] *See* DAVID BROWN, GOD & GRACE OF BODY: SACRAMENTS IN ORDINARY 283 (2007) (noting that the readers of BBC MUSIC MAGAZINE voted *The Rite of Spring* "the century's most influential piece of music").

magazine/article/0,9171,928613,00.html) (last accessed July 1, 2010). But the Customs Service determined that Brancusi's sculpture was not art; instead, it was "a manufacture of metal," which had a 40% tariff. *Id.* Brancusi sued the Customs Service and won, with the Customs Court declaring that his sculpture was a work of art. *Brancusi v. United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928); *see also Miniature Fashions, Inc. v. United States*, 55 Cust. Ct. 154, 157 (1965).

In this case, the City of San Marcos did not have trouble recognizing art: It stipulated that Petitioners' work was intended to be — and was — a work of "artistic expression." App. 60-61. The Fifth Circuit permitted the City to ban its public display because it was (according to that court) not "great" art.

B. Under the Fifth Circuit's "greatness" test, relatively few contemporary artists and art can expect First Amendment protection.

Under the "greatness" test established by the Fifth Circuit, the First Amendment does not fully apply to artworks that are not "great." The Fifth Circuit's holding would allow "non-great" artworks to be banned without even applying the First Amendment standards that this Court has established. Even if the artworks are indisputably "good," they can still be banned under the Fifth Circuit's rule. It is only

those artworks that reach the pinnacle of "greatness" that qualify for First Amendment protection.[5]

Even if the Fifth Circuit's test were grounded in the Constitution or this Court's precedents – which it is not – one central problem with the new test is that whether, and how, a work is determined to be "great" involves, at best, a murky inquiry. Is "great" a synonym for iconic – meaning that the work has stood the test of time, is on museum display, is published in catalogues, and is the subject of broad and sustained scholarly commentary? If so, then the First Amendment will protect only a relatively few artists who are working today. Instead, the Fifth Circuit would protect only artists who are universally acclaimed, whether because their work is hanging in museums, is widely taught in art history curricula, or is acquired for large sums of money. Experience shows that those are generally not the artists – and those are unlikely to be the artworks – most in need of First Amendment protection from governmental regulation.

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[5] Of course, that does not mean that artworks deemed "great" are not at risk of being banned. In this case the Fifth Circuit, out of "an abundance of caution," assessed the application of the city ordinance to the artwork using the intermediate scrutiny First Amendment analysis, even though it had held this non-great artwork did not, in fact, deserve any First Amendment protection. *Kleinman*, 597 F.3d at 328. It held that the government could prohibit public display of this artwork under the "junked vehicle" ordinance. *Id.* at 328-29.

Cézanne and Gauguin were not universally regarded as great in their own day. Perhaps only a relatively small number of artists working today could realistically lay claim to being "great." Under the Fifth Circuit's test, few – if any – contemporary artists and artworks will be protected in full by the First Amendment.

An irony of the Fifth Circuit's rule is that it protects artwork that might not have been protected when it was created. While many artworks hanging in museums might be able to meet the greatness standard today, they might not have been able to do so when they were created. *See* II(A) above. So Cézanne's great works of art would be fully protected today, but that would not necessarily have been the case in 1920. Neither the First Amendment nor the artwork itself has changed in the interim, but, under the Fifth Circuit's rule, a work that might not have had any First Amendment protection in 1920 would be fully protected in 2010. Unworkable would be a generous characterization of the Fifth Circuit's rule.

C. Limiting First Amendment protection to art that is "great" creates a danger that unpopular art will be banned and requires courts to render artistic judgments.

This Court has been understandably wary of allowing the government to rely on subjective judgments in the First Amendment area. It has warned

that subjective judgments can be "a public rationalization" of an improper decision. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981). And this Court has explained that aesthetic judgments are "necessarily subjective." *Id.*

Art universally acclaimed as "great" is far more likely to be "approved" by the government. That art, however, does not need the protection afforded by the First Amendment. As this Court's precedents demonstrate, expression that is unpopular or at the margins most needs the protection of the First Amendment against arbitrary governmental action. The Fifth Circuit's requirement that art must be "great" before it is entitled to First Amendment protection gives governments almost limitless discretion to regulate or prohibit display of a wide range of artistic expression.

The inherent subjectivity in the "great" versus "not-great" determination also poses considerable challenge for judicial review of government actions to regulate or prohibit the display of art. Cases in an analogous area – whether an artist has the right, under the Visual Artists Rights Act, 17 U.S.C. § 106A(a)(3)(B), to prevent the destruction of her work of art because it is "of recognized stature" – shows that the Fifth Circuit's rule will require courts to make difficult judgments as to the "greatness" of an artwork, whether drawing on their own experience or based on the often conflicting testimony of a

cavalcade of art historians and art "experts."[6] The Fifth Circuit's rule will impose considerable burdens, both on the artist seeking to challenge government action based on the artwork not being sufficiently "great" as to warrant full First Amendment protection and on the court required to assess the constitutionality of that act.

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[6] *See, e.g.*, *Martin v. Indianapolis*, 192 F.3d 608 (CA7 1999) (in absence of expert testimony, relying on press descriptions and letters to determine whether destroyed artwork had artistic merit); *Scott v. Dixon*, 309 F. Supp 2d 395, 400 (E.D.N.Y. 2004) ("stature" is "generally established through expert testimony"); *Pollara v. Seymour*, 150 F. Supp 2d 393, 397-98 (N.D.N.Y. 2001) (denying defendant's motion for summary judgment based on affidavits of artist-plaintiff's art experts); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1974) ("recognized stature" means meritorious, as recognized by art experts, the artistic community, or some cross-section of society), *rev'd in part on other grounds*, 71 F.3d 77 (CA2 1995).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 8, 2010

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(2)

No. 09-1494

Supreme Court, U.S.
FILED
JUL 6 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONERS FILED BY AMICI CURIAE TEXAS CIVIL RIGHTS PROJECT, NATIONAL COALITION AGAINST CENSORSHIP, FIRST AMENDMENT PROJECT, WASHINGTON AREA LAWYERS FOR THE ARTS, THE ARTHOUSE AT THE JONES CENTER, and BIG UMBRELLA STUDIOS

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INTEREST OF *AMICI CURIAE*

The **Texas Civil Rights Project** ("TCRP") is a non-profit public interest law organization of about 3,000 members that for the last 20 years has promoted racial, economic, and social justice, as well as civil liberties, through education, advocacy, and litigation.[1] The Fifth Circuit's decision adversely affects the rights of artists to display their visual art on private property. This case is significant to TCRP, which has always had a strong interest in ensuring that individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action.

The **National Coalition Against Censorship** ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country. NCAC produces legal and scholarly analyses of important free-speech cases and controversies; educates policy-makers,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice and have consented to the filing of this brief. Such consents are being lodged herewith.

scholars, professional groups, and the general public on a wide range of free-expression issues; assists individuals and community organizations dealing with censorship; and promotes discussion and dialogue among diverse stakeholders in free-speech debates. To further its interest in protecting artistic expression, NCAC has established the Arts Advocacy Project, which works with visual artists around the country.

The **First Amendment Project** ("FAP") is the only nonprofit organization in the country dedicated to providing free legal services exclusively on public interest free speech and free press matters. Artists are among FAP's core constituency. FAP represents artists whose First Amendment right to create and display or perform their art is threatened by governmental action. As such, FAP has a strong interest, both for itself and on behalf of its clients, in ensuring that artists' First Amendment rights maintain their vigor.

Washington Area Lawyers for the Arts ("WALA") is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C. metropolitan area, annually serving hundreds of individuals and organizations, including artists who create outdoor sculpture with non-traditional media. Most of WALA's clients have yet to receive widespread acclaim and cannot rely on courts to perceive "greatness" in their art as a condition for protection under the First Amendment.

The **Arthouse at the Jones Center** ("Arthouse") located in Austin, Texas, creates meaningful opportunities to investigate and experience the art of

our time through exhibitions, programs and commissions of new work. Arthouse is currently renovating its facility to include a large display window facing Congress Avenue in downtown Austin, and is concerned about the Fifth Circuit's troubling decision that artwork incorporating automobiles or automobile parts may be constitutionally prohibited from public display even behind a gallery window.

Big Umbrella Studios ("BUS") is a cooperative art gallery and shared studio in San Francisco, California. BUS was established by artists as a place to create and show their work, and encourages artistic experimentation, community involvement, and is an open door to the local society of urban artistic action and collaboration.

SUMMARY OF ARGUMENT

This case involves the municipal seizure from private property of a work of visual art created from a wrecked automobile. The parties stipulated that Petitioners always intended to physically modify the wrecked car to transform it into artwork, that two Petitioners, visual artists, painted the car with their unique images, intending to convey specific ideas to their roadside audience, and that after completion the artwork projected some level of artistic expression. Yet the Fifth Circuit in *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010), *petition for cert. filed*, __ U.S.L.W. __ (U.S. June 4, 2010) (No. 09-1494), upheld the city's complete prohibition of public display of this artwork anywhere in the city limits, even on private property, and held that the case did not require any analysis under the First Amendment.

Certiorari should be granted because *Kleinman* conflicts with *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557 (U.S. 1995), by holding that only "great works of art" merit constitutional protection. In addition, certiorari should be granted to resolve the Circuit split that *Kleinman* creates. In the First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits, numerous forms of expressive conduct—including cabaret music, internet domain names, artistically arranged nudes, zombie protests, graffiti-painted clothing, video games, a minor classroom protest, and sidewalk paintings of nature scenes, none of which, perhaps, can be called "great works of art," are held to be expressive conduct for which a reviewing court must perform a First Amendment analysis and require the government to justify its restrictions on artistic or symbolic expression.

In contrast, federal district courts following the Fifth Circuit's approach can now summarily uphold any reasonable state regulation that burdens expressive conduct or artistic expression, so long as no "great works of art" are involved. The Court should grant certiorari to correct this troubling misinterpretation of the Court's precedent and to resolve the Circuit split on what constitutes protected symbolic or artistic expression.

Although ending its analysis with a determination that the case does not involve a great work of art, the Fifth Circuit "[i]n an abundance of caution" applied the intermediate scrutiny test under which the government's power to regulate is balanced with an individual's right to speak. The Fifth Circuit concluded

that the application of the ordinance to Petitioners passed muster, but the analysis is flawed because the Fifth Circuit entirely denies any consideration of Petitioners' right to publicly display their artwork on private property. Certiorari should be granted because *Klemman* conflicts with *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), by holding that a complete citywide ban on public display of the artwork leaves open ample alternative channels of communication to the Petitioners.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's ruling conflicts with this Court's decision in *Hurley*, which established that expressive symbolic conduct is protected expression even when no particular message is intended or received.

In holding that a veterans council's selection of groups to march in a parade, including the choice to exclude a gay rights group, constituted protected expression, this Court in *Hurley* held that expressive conduct need not convey "a particularized message." Instead, as the Court made clear through the use of famous examples, the First Amendment "unquestionably shielded" symbolic, expressive conduct such as art done for art's sake:

> [T]he Constitution looks beyond written or spoken words as mediums of expression. . . . [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a

> particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Id. at 569 (citations, quotation marks and brackets omitted). Many lower court symbolic speech cases have since quoted and applied *Hurley*'s picturesque language. And as shown in Section D below, each case interpreted *Hurley* as ***expanding*** the universe of protected expressive conduct. The Fifth Circuit, however, departed from that approach.

B. *Kleinman* misinterprets *Hurley* to hold that the First Amendment applies to an expressive work of visual art only when an appellate court judges it to be a "great work of art."

The Fifth Circuit held that no First Amendment analysis was needed of a city regulation that prohibits public display of Petitioners' artwork anywhere within the city limits. Despite the parties' stipulation that the Petitioners' artwork contains and projects artistic expression, the Fifth Circuit held that the category of "constitutionally-protected expression . . . is not so unbounded." *Kleinman*, 597 F.3d. at 326.[2] Quoting

[2] This Court must refuse to consider an argument that contradicts a joint factual stipulation of the parties. *See Christian Legal Soc'y v. Martinez*, No. 08-1371, 2010 WL 2555187, at *9-10 (U.S. June 28, 2010) (holding that "factual stipulations are formal concessions that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact") (internal quotes and ellipses omitted).

Hurley's iconic language regarding "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," the Fifth Circuit held that "*Hurley* refers solely to great works of art," and that "[n]either in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." *Id.*

The Fifth Circuit expressed its "skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression," and pointedly disparaged "the capability [and] intention of the artists" who created "this cactus planter, a three-dimensional advertisement for a novelty shop." *Id.* at 326-27. "Protected expression takes many forms, but *Hurley*'s reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression." *Id.* at 327.

The Fifth Circuit thus concluded that ***no First Amendment analysis was necessary*** to adjudicate Petitioners' First Amendment as-applied challenge to the city's junked vehicle ordinance, although it completely prohibits the public display of their work of visual art. "When the 'expressive' component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation. We therefore pretermit 'recourse to principles of aesthetics.'" *Klemman*, 596 F.3d at 327-28 (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 95 (2d Cir. 2006)).

Although the Fifth Circuit went on to apply a cursory First Amendment analysis in "an abundance of caution," *id.* at 328, *Kleinman*'s primary holding is that the First Amendment only applies to "great works of art," a holding that now binds all federal courts in the Fifth Circuit. *See United States v. Wright*, 496 F3d 371, 375 n.10 (5th Cir. 2007) (holding that "alternative holdings are binding, they are not dicta"). Accordingly, if this Court allows *Kleinman* to stand, municipal governments in Texas, Mississippi and Louisiana are free to completely prohibit visual artists from publically displaying their works from private property if such works are not judged to be "great art."

C. The Fifth Circuit's creation of a "great works of art" test out of whole cloth is contrary to decades of this Court's rulings.

The Fifth Circuit thus has created a new test that is contrary not only to *Hurley*, but also to numerous other holdings of this Court that have confirmed repeatedly that expression does not have to be adjudged valuable, great or profound to be constitutionally protected, and that it is inappropriate for courts to make determinations of artistic value or greatness.

Artistic expression cannot be governmentally prohibited "simply on the basis that some speech is not worth it." *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). The Court in *Stevens* forcefully rejected any suggestion that speech must be assessed for its "value" before it can be considered protected expression. *Id.* at 1585. Any suggestion that the Court should adopt such "a free-floating test for First Amendment coverage" is

"startling and dangerous." *Id.* "***Most*** of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical or artistic value' (let alone serious value) but it is still sheltered from government regulation. Even 'wholly neutral futilities come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Id.* at 1591 (emphasis in original) (some internal quotation marks and ellipses omitted) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

Freedom of speech includes "the freedom to speak foolishly and without moderation," and accordingly even "distasteful," "trifling and annoying" expression is protected from censorship. *Cohen*, 403 U.S. at 25-26. It is "often true that one man's vulgarity is another man's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25; *see also Holder v. Humanitarian Law Project*, No. 08-1498, 78 U.S.L.W. 4625, 2010 WL 2471055, at *18-19 (U.S. June 21, 2010) (reaffirming *Cohen*). Even a "crude and amateurish and perhaps unappealing" skit performed in the street is protected artistic expression. *Schacht v. United States*, 398 U.S. 58, 61-64 (1970). In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 917 (2010), the Court emphasized that the political film at issue was artistic expression deserving of protection whether it was "insightful and instructive" or unfair and trite.

> [S]ome might find it to be neither high art nor a fair description on how to set the Nation's

> course. . . . Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."

Id. (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring in part and dissenting in part)).

The Court has carefully scrutinized municipal regulations to ensure that a governmental authority is not imposing its own bureaucratic vision of artistic "quality" on artists in the guise of neutral regulation. In *Ward*, the Court noted concerns that "the government may not interfere with artistic judgment," and upheld a municipal regulation after determining that the city was ***not*** "seeking to assert artistic control over performers." 491 U.S. at 792-93.

In addition to being constitutionally infirm, the Fifth Circuit's new test is impractical and subjective.

> [I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada and art in the replication of a soup can. . . . Just as there is no use

> arguing about taste, there is no use litigating about it. For the law courts to decide 'What is Beauty' is a novelty even by today's standards.

Pope v. Illinois, 481 U.S. 497, 504-05 (1987) (Scalia, J., concurring).

"[T]he First Amendment does not permit a majority to dictate . . . the value that may be found in various pieces of work. . . . Reasonable people certainly may differ as to what constitutes literary or artistic merit." *Id.* at 506 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens pointed out that time has disproved previous "arguments formerly made about what are now valued as works of art." *Id.* at 519 (Stevens, J., dissenting). "It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population. . . . First Amendment protection surely must not be contingent on this type of subjective determination." *Id.* at 512-13 (internal quotes omitted). "In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." *Id.* at 519.

Thus, this Court has long held that the First Amendment forbids governments or courts to dictate "what is good art." Expression may not be governmentally suppressed "because it failed to meet some standard of worth or value or propriety." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 152 (1946).

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

Id. at 157-58 (footnotes omitted); *see also United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 137 (1973) ("[W]hat may be trash to me may be prized by others.") (Douglas, J., dissenting).

In a case involving symbolic expression by conduct, the Court confirmed that the government does not have the power to "prescribe what shall be orthodox." *Texas v. Johnson*, 491 U.S. 397, 415 (1989); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, whether it be of the popular variety or not.").

In sum, the Fifth Circuit has basically judged that Petitioners' artwork is so inconsequential that the government has the unbounded power to require that the artwork be completely hidden from public view. This unconventional piece of visual art made from a wrecked automobile may not be to everyone's taste, but

"a requirement that . . . art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan*, 327 U.S. at 158.

D. The Fifth Circuit's novel and unduly restrictive interpretation of *Hurley* is contrary to that of many other courts that have quoted the same language and has created a Circuit split.

The Fifth Circuit's interpretation of *Hurley* as ***contracting*** First Amendment protection of expressive conduct is contrary to the interpretation of seven other federal circuit courts, which quoted and interpreted *Hurley*'s passage about Pollack, Schöenberg and Carroll to mean that expressive conduct does not require any specific message in order to be protected, and to trigger a First Amendment analysis requiring the government to justify its restriction of the expression.

First Circuit:

- *Casey v. City of Newport, Rhode Island*, 308 F3d 106, 110 (1st Cir. 2002) (amplified instrumental music and cabaret singing protected under *Hurley* because "[e]xpression need not include words to qualify for First Amendment protection");

Second Circuit:

- *Bery v. City of New York*, 97 F3d 689, 696 (2d Cir. 1996) (under *Hurley*, works of visual art such as "paintings, photographs, prints and

sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection");

- *Mastrovincenzo v. City of New York*, 435 F3d 78, 92, 97 (2d Cir. 2006) (interpreting *Hurley* as holding that protected expressive conduct need not convey a particularized message; holding that graffiti-painted hats and clothing "serve a predominantly expressive purpose, and their sale is consequently protected under the First Amendment");

- *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F3d 573, 586 (2d Cir. 2000) (certain internet domain names could be used for "an expressive purpose" and be protected communication under *Hurley*);

- *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F3d 197, 205 n.6 (2d Cir. 2004) (noting "*Hurley*'s caution against demanding a narrow and specific message before applying the First Amendment");

- *Tanick v. Safir*, 209 F3d 67, 82 (2d Cir. 2000) (photo shoot of "75 to 100 nude models arranged in an abstract formation" was "artistic activity . . . entitled to some First Amendment protection" under *Hurley*);

Third Circuit:

- *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1087 (3d Cir. 1995) ("[I]n the wake of *Hurley* . . . the threshold test of expressiveness necessary to raise a First Amendment compelled expression claim is no longer as stringent");

Sixth Circuit:

- *Condon v. Wolfe*, 310 F. App'x 807, 819-20 (6th Cir. 2009) (*Hurley* "minimized the 'particularized message' requirement");

Eighth Circuit:

- *Baribeau v. City of Minneapolis*, 596 F.3d 465, 470, 477 (8th Cir. 2010) (plaintiffs who "dressed as zombies," to "protest the 'mindless' nature of consumer culture" were "engaged in protected expressive conduct" under *Hurley*);

- *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, 329 F.3d 954, 957 (8th Cir. 2003) (video games are protected expression under *Hurley*);

Ninth Circuit:

- *White v. Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("So long as it is an artist's self-expression, a painting will be protected under [*Hurley*], because it expresses the artist's perspective");

Eleventh Circuit:

- *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (student's silent raising of fist and refusal to say the Pledge of Allegiance was protected; *Hurley* "liberalized" the test of "whether a particular act counts as expressive conduct," requiring only "***some*** sort of message," not necessarily "a ***specific*** message") (emphasis original).

Under these circuit decisions (as well as in similar decisions by state supreme courts and federal district courts)[3] numerous forms of symbolic and expressive conduct—none of them "great art"—were held to

[3] *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001) (T-shirts of the Three Stooges were protected because *Hurley* "made it clear that a work of art is protected by the First Amendment even if it conveys no discernable message"); *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01-Civ-1226 (DAB), 2004 WL 1982520, at *9 (S.D.N.Y. Sept. 8, 2004) ("artwork has been deemed 'a quintessential form of expression' worthy of and requiring First Amendment protections," and under *Hurley*, "[i]t is of no consequence that the [cast-iron sculpture at issue] has no particularized message"); *Cunningham v. New Jersey*, 452 F. Supp. 2d 591, 595 (D.N.J. 2006) (*Hurley* "relaxed its requirement of 'particularized message' somewhat"); *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1229 (W.D. Wash. 2007) (under *Hurley*, "instrumental compositions, like the dodecaphonic music of Arnold Schoenberg, qualify for First Amendment protection"), *aff'd*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1937 (2010); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 814, 854 n.6 (N.D. Ohio 2004) ("the Supreme Court relaxed the requirement that the message be particularized in *Hurley*").

require First Amendment analysis. *Hurley* itself involved a parade with no particular message, hardly a "great work of art," either.

The Fifth Circuit thus stands alone in summarily upholding any "reasonable state regulation" that burdens expressive conduct or artistic expression that is not "great" art. *Kleinman*, 596 F.3d at 327. The Court should grant certiorari to resolve the Circuit split and correct this troubling misinterpretation of its precedent.

E. The Fifth Circuit's application of *O'Brien* did not take into account the significant fact that this artwork was being displayed on private property.

In an "abundance of caution," almost as an afterthought, the Fifth Circuit performed a cursory analysis under *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward*, concluding that the actual effect of the ordinance on the public display of Petitioners' artwork was "immaterial," and upholding the ordinance as generally justified by the "City's right to regulate junked vehicles." *Kleinman*, 597 F.3d at 328.

The Fifth Circuit's flawed analysis should not be allowed to stand if artistic expression and public display of artwork on private property are constitutionally protected. This Court recently reaffirmed the *O'Brien* standard, noting that "a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder*, 2010 WL 2471055, at *18 (citing

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)) (internal quotation marks omitted). Citing *O'Brien* and *Ward*, the Fifth Circuit considered whether the ordinance is "reasonably tailored to achieve the City's legitimate interests" and provides an "adequate alternative means of expression." *Kleinman*, 597 F.3d at 328-29. The Fifth Circuit's flawed analysis concluded that "the ordinance is limited to regulating the medium and the location of the car planter." *Id.* at 329. This ruling does not merely "regulate," but completely forbids Petitioners to use the "medium" of vehicles or vehicle parts in publically displayed artwork and allows that the only "location" available to display car-based artwork is inside a building, behind an opaque fence or under a canvas cover.

The Fifth Circuit's conclusion thus entirely forecloses any public display of the artwork on the Planet K property. Indeed, it prevents public display of the artwork anywhere within the city limits. As expressive conduct, the artwork and its public display are entitled to full protection under the First Amendment. Reviewing the ordinance under an intermediate scrutiny standard, the Fifth Circuit fails to give weight to the fact that the ordinance, as applied, completely forecloses Petitioners' public display of the artwork, made from the artists' chosen medium, a car, on private property.

Under the intermediate scrutiny standard, "reasonable restrictions on the time, place, or manner of protected speech" are permitted provided that "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly

tailored to serve a significant government interest'" and "'leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Fifth Circuit applied the intermediate scrutiny standard without regard or consideration for the character of the property at issue—a public display of artwork on private property. Under the Fifth Circuit's flawed analysis, any such display is entirely banned.

This Court has recognized that "the character of the property at issue" impacts the determination of the extent of First Amendment protection. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). This case involves a public display of artwork on private property. Activity that takes place on private property requires examination of the interests advanced by the city "with particular care." *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974). Moreover, this Court has long noted a "special respect for individual liberty" on private property. *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). The need to regulate speech from that location is "surely much less pressing" than the need to regulate speech in public places. *Id.*

In *Ladue*, the plaintiff displayed a sign protesting the first Gulf War on her front lawn. In displaying the sign, she disobeyed a local ordinance that, with certain exceptions, prohibited signs on residential front lawns. Balancing the ordinance's public purpose with the resident's right to communicate from his or her own property, this Court concluded that the ordinance's purpose did not justify an almost complete ban on the

resident's "important medium of speech." *Id.* at 56. Noting "the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities," the Court distinguished regulation of speech from the speaker's property from the regulation of speech in a public place. *Id.* at 58 (citing *Spence*, 418 U.S. at 409). In *Spence*, the individual's display of a flag "on private property" was an important factor leading to an analysis different from one applied in considering use of public areas. 418 U.S. at 409. Here, the City's asserted interest in enforcing the ordinance against Petitioners is in "reduc[ing] the blight and attractive nuisance problems caused by vehicular wrecks." *Kleinman*, 597 F.3d at 329. If reduction of "blight" is the governmental interest at stake, then the city's interest is merely to remove from the public view any unconventional artwork that it considers to be unsightly. Such a justification for censoring artistic expression is entirely illegitimate. *See Ward*, 491 U.S. at 793 ("Any government attempt to serve purely esthetic goals by imposing subjective standards . . . would raise First Amendment concerns."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (noting that "esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"). Also, the Fifth Circuit does not explain how applying the junked vehicle ordinance to Petitioners' artwork reduces any "attractive nuisance" problem, if Petitioners are free to erect a fence in front of the artwork, "erect a sign or display a poster of the car-planter visible to the public" and "invite the public" to come inside the enclosure. *See Kleinman*, 597 F.3d at 329.

This Court has long made clear that expression on private property implicates different considerations than expression on public property, and must be treated differently. Several years before *Ladue*, the Court considered the validity of an ordinance that prohibited the posting of signs on public property. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Petitioners argued that the prohibition against signs could not be justified on esthetic grounds because the ordinance did not apply equally to signs on private property. This Court rejected the argument. "**The private citizen's interest in controlling the use of his own property justifies the disparate treatment.**" *Id.* at 811 (emphasis added). In addition, limiting the ban to public property meant that speakers still had a means of communication from ***private*** property. *Id.* This Court's decisions demonstrate that the location of the artwork on private property is an important interest that the Fifth Circuit was required to consider in undertaking an intermediate scrutiny analysis. Here there is no need to mediate competing uses of public space. In sum, the ordinance's restriction on the public display of any car-based artwork ***on private property*** must be weighed heavily in balancing the city's interests and the effect of the ordinance on First Amendment rights. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002) ("there must be a balance between [the town's] interests and the effect of the regulations on First Amendment rights").

Further, the ordinance is not narrowly tailored to "the City's legitimate interests with only incidental restriction on protected expression." *Kleinman*, 597

F3d at 328. A complete ban of Petitioners' chosen means of expression through the roadside display of their car-based artwork on the Planet K property is not an "incidental restriction." *Id.* In *Bery*, the Second Circuit held that an exception for visual art was required in an otherwise valid municipal vending license system. Although the city had a significant interest in keeping public places safe and uncongested, a license requirement that effectively barred the visual artists from displaying or selling their art on the streets was "too sweeping to pass constitutional muster." 97 F3d at 697; *see Lusk v. Vill. of Cold Spring*, 475 F3d 480, 492 (2d Cir. 2007) (citing *Ladue*, 512 U.S. at 54) (concluding that the scope of the regulations was not justified because they foreclosed the homeowner's means of communication).

In this case, the junked vehicle ordinance is not narrowly tailored. With only limited exceptions for the storage of antique or special vehicles, the ordinance sweeps in all situations in which a property owner may display on his or her own property any work of visual art that incorporates a car or car parts. In this case, the "junked vehicle" has been made safe and has been modified and transformed into a work of art that the City stipulated was expressive. The city also stipulated that the medium of the "junked vehicle" was intended by the artists as an integral means of making an expressive statement. But the ordinance provides no exception for the artwork's display, such as *Bery* required. The ordinance is not narrowly tailored to further the city's interests in reducing blight and attractive nuisance problems. Instead, the ordinance places a substantial burden on expression. Similarly to the Ladue residents, Petitioners "are forbidden" to engage in protected artistic expression from their own

private property. *Ladue*, 512 U.S. at 54. Like the ordinance in *Ladue*, the junked vehicle ordinance unnecessarily sweeps too much protected expressive conduct within the ordinance and is constitutionally unsound. *Id.*

The Fifth Circuit also concluded erroneously that the ordinance did not foreclose alternative means of communication. *Kleinman*, 597 F.3d at 329. The Fifth Circuit ignores the requirement of "ample" channels of communication. *See Ladue*, 512 U.S. at 56 ("regulations that . . . shift the time, place, or manner of its use, must 'leave open ample alternative means of communication'"); *Ward*, 491 U.S. at 791 (a restriction on protected speech may be justified if it leaves "ample" alternative channels for communication of information). The fact that one "is permitted to communicate his message elsewhere does not end [the] analysis if the intended message is rendered useless or is seriously burdened." *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (9th Cir. 2002) (citing *Ladue*, 512 U.S. at 56-57). The channels that the Fifth Circuit posits are neither alternatives to public display nor ample. Under the ordinance, any artwork incorporating a junked vehicle must be hidden completely from public view. As the ordinance is written, any artwork using an inoperable vehicle or parts of a vehicle cannot be displayed even on a rooftop, on a museum's grounds, or behind a window facing the street at a location such as Amicus Curiae Arthouse's downtown gallery in Austin, Texas. This total ban exceeds what is needed to protect the city's asserted interest. *See, e.g., Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 595 (4th Cir. 1993) (striking down sign ordinance that did not provide viable expression "alternative to homeowner ***on his property***") (emphasis original).

An artist's freedom to display artwork only in private does not provide an ample alternative channel for communication. "The public display and sale of artwork is a form of communication between artist and the public not possible in the enclosed, separated spaces of galleries and museums." *Bery*, 97 F.3d at 698. In short, "an alternative is not ample if the speaker is not permitted to reach the intended audience." *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009) (internal quotation marks omitted); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government had provided as a safe haven for crackpots.").

The First Amendment requires that Petitioners be allowed an ample channel for public communication to their desired audience.

CONCLUSION

For all of these reasons, the Court should grant the petition for certiorari.

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